DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-930 *** CAPITAL CASE ***
Title: Charles L. Ryan, Director, Arizona Department of Corrections, Petitioner
v.
Ernest Valencia Gonzales
Docketed: January 20, 2011
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (08-72188)
Decision Date: October 20, 2010
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jan 18 2011	Petition for a writ of certiorari filed. (Response due February 22, 2011)
Feb 10 2011	Order extending time to file response to petition to and including April 25, 2011.
Feb 21 2011	Brief amici curiae of Utah, et al. filed.
Apr 25 2011	Brief of respondent Ernest Valencia Gonzales in opposition filed.
May 9 2011	Reply of petitioner Charles L. Ryan, Director, Arizona Department of Corrections filed. (Distributed)
May 10 2011	DISTRIBUTED for Conference of May 26, 2011.
May 31 2011	The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States.
Feb 9 2012	Brief amicus curiae of United States filed.
Feb 20 2012	Supplemental brief of petitioner Charles L. Ryan, Director, Arizona Department of Corrections filed. (Distributed)
Feb 22 2012	DISTRIBUTED for Conference of March 16, 2012.
Mar 14 2012	Supplemental brief of respondent Ernest Valencia Gonzales filed. (Distributed)
Mar 19 2012	Petition GRANTED.
Apr 20 2012	The time to file the joint appendix and petitioner's brief on the merits is extended to and including May 25, 2012.
Apr 20 2012	The time to file respondent's brief on the merits is extended to and including July 20, 2012.
May 25 2012	Brief of petitioner Charles L. Ryan, Director, Arizona Department of Corrections filed.
May 25 2012	Motion to dispense with printing the joint appendix filed by petitioner Charles L. Ryan, Director, Arizona Department of Corrections.
May 31 2012	Brief amicus curiae of Arizona Voice for Crime Victims filed.
Jun 1 2012	Brief amicus curiae of the United States filed (also in 11-218)
Jun 1 2012	Brief amici curiae of Utah, et al. filed (also in 11-218).

Jun 11 2012	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Jul 20 2012	Brief of respondent Ernest Valencia Gonzales filed. (Distributed)
Jul 23 2012	SET FOR ARGUMENT ON Tuesday, October 9, 2012
Jul 24 2012	CIRCULATED.
Jul 25 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Jul 26 2012	Record received from U.S.C.A. for 9th Circuit. (1 box)
Jul 27 2012	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. (also in 11-218)
Jul 27 2012	Brief amici curiae of Retired Federal Judges filed. VIDED. (Distributed)
Jul 27 2012	Brief amici curiae of American Psychiatric Association, et al. filed. VIDED. (Distributed)
Jul 27 2012	Brief amici curiae of American Civil Liberties Union, et al. filed. VIDED.
Jul 27 2012	Brief amicus curiae of American Bar Association filed. VIDED.
Aug 2 2012	Record received from U.S.D.C. for District of Arizona. (3 boxes)
Aug 13 2012	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Aug 20 2012	Reply of petitioner Charles L. Ryan, Director, Arizona Department of Corrections filed. (Distributed)
Oct 9 2012	Argued. For petitioner: Thomas C. Horne, Attorney General, Phoenix, Ariz. For United States, as amicus curiae supporting petitioners in Nos. 11-218 & 10-930: Ann O'Connell, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For respondent: Leticia Marquez, Assistant Federal Public Defender, Tucson, Ariz.

PETITION FOR WRIT OF CERTIORARI

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED

No. _____ 10-930

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IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN, WARDEN
ARIZONA DEPARTMENT OF CORRECTIONS,
Petitioner,

vs.

ERNEST VALENCIA GONZALES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Several years after Gonzales's counsel initiated federal habeas proceedings and filed an exhaustive petition seeking relief, counsel asserted that Gonzales was incompetent to communicate rationally and the proceedings should be indefinitely stayed pending possible restoration of competency. Based on 18 U.S.C. § 3599(a)(2), the Ninth Circuit agreed, even though Gonzales's claims were record-based or purely legal.

Did the Ninth Circuit err when it held that 18 U.S.C. § 3599(a)(2)—which provides that an indigent capital state inmate pursuing federal habeas relief "shall be entitled to the appointment of one or more attorneys"—impliedly entitles a death row inmate to stay the federal habeas proceedings he initiated if he is not competent to assist counsel?

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PETITION FOR WRIT OF CERTIORARI

Charles L. Ryan, Director of the Arizona Department of Corrections (the State), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit (the Ninth Circuit).

OPINION BELOW

The Ninth Circuit's opinion is reported as *In re Ernest Valencia Gonzales*, 623 F.3d 1242 (9th Cir. 2010). (Pet. App. A.) The district court's unpublished response to a Ninth Circuit Order is dated August 28, 2008. (Pet. App. B.) The district court's order denying a stay is published at *Gonzales v. Schriro*, 617 F.Supp.2d 849 (D. Ariz. 2008) (Pet. App. C.) Additional Ninth Circuit unpublished orders are dated May 23, 2008 (Pet. App. D), June 19, 2008 (Pet. App. E), July 7, 2008 (Pet. App. F), amended order July 7, 2008 (Pet. App. G), second amended order January 5, 2009 (Pet. App. H). The Ninth Circuit docket (Pet. App. I).

STATEMENT OF JURISDICTION

The Ninth Circuit entered judgment on October 20, 2010. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The entire provisions of 18 U.S.C. § 3599 are set forth in the last appendix, Appendix J. The relevant part on which the Ninth Circuit relied, 18 U.S.C. § 3599(a)(2), provides:

> (2) In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

STATEMENT OF THE CASE

Through 18 U.S.C. § 3599(a)(2), Congress provided for the appointment of counsel for indigent defendants in capital habeas proceedings. The Ninth Circuit has essentially rewritten the statute to impliedly create two additional rights: to be competent to assist counsel during a capital federal habeas proceeding and to obtain a stay of the proceedings if the petitioner was incompetent. *Rohan ex rel. Gates*, 334 F.3d 803, 819 (9th Cir. 2002) (holding that where a state capital prisoner could "potentially benefit" from his ability to rationally communicate with counsel, he is entitled to a stay of his habeas proceedings). The Ninth Circuit extended these two newly-discovered statutory rights to apply in an appeal from a denial of the habeas petition and to have the case stayed pending a determination of

competency. *Nash v. Ryan*, 581 F.3d 1048 (9th Cir. 2009).[1]

In this case, the court similarly extended those rights still further by holding that they apply in district court even where the issues are record-based and legal in nature. Pet. App. A, at 2.

The Ninth Circuit's application of Section 3599(a)(2) is untethered to the language of the statute and is based on a flawed policy ground – that an indigent capital defendant's input can be essential even when the habeas claims are record-based or legal in nature. The consequence of this ruling is that capital defendants in the Ninth Circuit now have a new means of delaying their proceedings, contrary to Congress's stated intent in enacting the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") to reduce delay in capital cases.

A. Relevant State Criminal Proceedings

Respondent Ernest Valencia Gonzales was convicted of the February 1990 murder of Darrel Wagner in Phoenix, Arizona, as well as related crimes, and sentenced to death for the murder. *State v. Gonzales*, 892 P.2d 838 (Ariz. 1995). His convictions and death sentence became final on January 8, 1996. *Gonzales v. Arizona*, 516 U.S. 1052 (1996). Gonzales then exhausted his state-court post-conviction relief opportunities.

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[1] In *Nash*, the State sought certiorari review in this court, but the inmate's death mooted the case.

B. Federal District Court Habeas Proceedings

In November 1999, the federal court stayed Gonzales's execution when he initiated a post-AEDPA federal habeas proceeding seeking relief from the state-court judgment. *Gonzales v. Schriro*, CV99-02016-PHX-SMM, at Docs. 1, 3. His counsel filed a 237-page amended petition raising 60 claims for federal habeas relief. Pet. App. B, at 3. Gonzales returned to state court in 2001 to pursue a successive state-court post-conviction relief petition. *Id.* In the state proceedings, his post-conviction relief counsel raised the issue of Gonzales's competence to assist counsel, a claim that the state court found not cognizable. *Id.* Then, 3 years after the appointment of habeas counsel, Gonzales started to refuse visits from his attorneys. *Id.*

Following the case's return to federal district court, the court, in January 2006, found 31 of Gonzales's habeas claims were appropriate for merits review. *Id.* at 4. Because of the 6 years that had elapsed since habeas counsel had filed Gonzales's amended petition, the district court provided an opportunity for habeas counsel to file up-to-date legal citations and argument in support of the properly exhausted claims. *Id.* "On the eve of the Court's deadline for [Gonzales's] opening merits brief, counsel filed a *Rohan* motion for a competency determination and a stay." *Id.* at 5. Initially, the district court set the matter for an evidentiary hearing, but vacated it so Gonzales could be sent to the state hospital for further

evaluation. *Id.* There Gonzales withdrew from a regimen of anti-psychotic medication despite its apparently positive effects. *Id.*

After additional briefing, review of the mental health information, the entire state court record and the remaining habeas claims in light of the *Rohan* decision, the district court concluded that Gonzales's claims were record-based and involved purely legal issues and "therefore [Gonzales] would not potentially benefit from his ability to communicate rationally with counsel." *Id.* at 6. The district court declared that, "[i]n sum, the Court has endeavored to follow *Rohan*. In doing so, the Court accepted [Gonzales's] contention that he is not presently competent to communicate rationally with counsel but found this fact irrelevant because none of the claims remaining to be decided by this Court are ones that 'could benefit from his ability to communicate rationally.'" *Id.* at 11 (quoting *Rohan*). The district court therefore denied Gonzales's Motion for a Competency Determination and to Stay Proceedings. Pet. App. C, at 27. It further denied Gonzales's request for an interlocutory appeal under 28 U.S.C. § 1292(b).

C. Proceedings in the Ninth Circuit

On May 23, 2008, Gonzales filed an emergency petition for a writ of mandamus and an emergency motion for a stay of the district court proceedings. In an order filed June 19, 2008, a Ninth Circuit panel (Judges Stephen Reinhardt, Marsha S. Berzon, and Milan D. Smith) stayed the lower court proceedings. Pet. App. D. The following month, the panel denied Arizona's motion for reconsideration. Pet. App. E, F.

Months later, in an order filed January 5, 2009, the panel further stayed the case pending decisions in *Nash v. Schriro*, No. 06-99007 and *Adams v. Schriro*, No. 07-99018, because those cases involved "related issues." Pet. App. G.

Nearly 2 years after the grant of the temporary stay, over 1 year after the decision in *Nash*, and nearly 6 months after Arizona filed a request for a ruling, Judge Reinhardt issued the opinion in this case granting the petition for a writ of mandamus.[2] Pet. App. A, at 8. The court held that "*Nash* squarely controls this case, foreclosing the district court's conclusion that a stay under *Rohan* is categorically unavailable when a capital habeas petitioner's claims consist only of record-based or legal questions." *Id.* at 5 (citing *Nash*.)

The panel reasoned that because Gonzales had been represented by several attorneys over the course of his state-court proceedings, Gonzales's judicial bias claim could potentially benefit from the 'first-hand insight into the earlier proceedings' that a competent petitioner would be able to provide." *Id.* at 5-6 (citing *Nash*). In reaching that conclusion, the court disregarded the district court's prior finding that "it is clear from a review of the state court record that the factual underpinnings of [the judicial bias] claim were fully developed in state court and the record on the issue is complete." Pet. App. B, at 8.

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[2] Adams died waiting a decision in his case.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit created a competency right out of thin air. The Constitution does not provide a right to counsel on federal habeas corpus review. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). This Court has likewise never found a federal right to be competent to assist habeas counsel. The Ninth Circuit nonetheless found that *Congress* created such a right, even when the claims presented are entirely record-based or legal in nature.

The statute upon which the court relied, however, 18 U.S.C. § 3599, does nothing of the sort. Section 3599(a)(2) does not address the defendant's competence, and there is no reasoned basis for concluding that Congress intended that death penalty habeas proceedings should be stayed, suspending indefinitely enforcement of a presumptively valid state court judgment based on a death-sentenced inmate's alleged inability to assist counsel.

Moreover, the Ninth Circuit's line of cases (*Rohan*, *Nash*, *Gonzales*), based on its interpretation of Section 3599(a)(2), directly undercuts Congress's purpose in enacting AEDPA to "reduce delays in the execution of state and federal criminal sentences, particularly capital cases." *Woodford v. Garceau*, 538 U.S. 202, 206 (2003). Reading a competency requirement into the statute, when the AEDPA statutory scheme provides for no such requirement fosters unnecessary delays in the resolution of capital cases. Furthermore, such a requirement is inconsistent with this Court's "next friend" jurisprudence, which expressly recognizes that

habeas cases can proceed notwithstanding the mental incapacity of petitioners. And, it creates a two-tiered system under which indigent capital petitioners have a statutory right to be competent to assist habeas counsel while non-indigent capital petitioners do not. There is no basis to believe Congress intended to create such a regime.

Additionally, freezing the habeas proceeding perhaps indefinitely defeats the purpose of federal habeas review. If constitutional error occurred in the state court proceedings, it should be identified and relief granted; if not, the state's judgment should not be stymied. Long before enactment of AEDPA, this Court admonished the lower courts that federal habeas is not "a means by which a defendant is entitled to delay an execution indefinitely." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). If not overruled, the Ninth Circuit's ruling will significantly delay capital proceedings, and thereby frustrate the State's interest in proceeding with its judgments. This Court's review is necessary to halt further expanding this court-created impediment to moving capital cases forward.

I. THE NINTH CIRCUIT'S DECISION ERRONEOUSLY REWRITES A FEDERAL STATUTE TO GRANT HABEAS PETITIONERS IN CAPITAL CASES A RIGHT TO STAY PROCEEDINGS IF THEY ASSERT THEY ARE NOT COMPETENT TO ASSIST COUNSEL.

The Ninth Circuit, alone among the circuits, has discovered a right to competence to assist habeas

counsel in 18 U.S.C. § 3599(a)(2).[3] This subsection declares:

> In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys . . . .

The provision does not mention competence to assist counsel. Rather, it merely grants indigent habeas petitioners under a sentence of death a right to be represented by appointed counsel in a proceeding under 28 U.S.C. §§ 2254 or 2255 and certain additional post-conviction proceedings.[4] Nothing in the "plain language" of the statute, *see Harbison*, 129 S. Ct. at

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[3] The source of the statutory right discovered in *Rohan* was 21 U.S.C. § 848(q)(4)(b), enacted 22 years earlier. *Rohan*, 334 F.3d at 814. That provision has been replaced, effective October 13, 2008, by § 3599(a)(2), a "materially identical statute." *Nash*, 581 F.3d at 1051 n.5; *see also Harbison*, 556 U.S.___, 129 S. Ct. 1481, 1486 (2009) ("recodified without change").

[4] "Under a straightforward reading of the statute, subsection (a)(2) triggers the appointment of counsel for habeas petitioners, and subsection (e) governs the scope of appointed counsel's duties." *Harbison*, 129 S. Ct. at 1486. Among other duties, subsection (e) allows federally appointed counsel to seek stays, to represent habeas petitioner in a *Ford v. Wainwright*, 477 U.S. 399 (1986), competency to be executed hearing, or represent a habeas petitioner in a state clemency proceeding. Like subsection (a)(2) the scope of subsection (e) grants no rights beyond representation, nor did the Ninth Circuit suggest that it did.

1486, requires that an indigent state prisoner under a sentence of death be competent to assist counsel before his federal habeas may proceed. And nothing in its plain language provides any right to have the habeas proceeding stayed when the petitioner might not be able to communicate rationally with his counsel.

Lacking textual support, the Ninth Circuit instead relied upon policy for reading a competency requirement into the provision. *See Rohan*, 334 F.3d at 812-13 ("Congress has not explicitly required competence in federal habeas proceedings, but the common law tradition underlying the right to competence and its great practical significance in this context inform our interpretation of the statutes Congress has enacted."). Yet this Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations and internal quotation marks omitted). A court's "task is to apply the text, not improve upon it." *Harbison*, 129 S. Ct. at 1494 (quoting *Pavelic & LeFlore v. Marvel Entertainment Group, Div. of Cadence Industries Corp.*, 493 U.S. 120, 126 (1989)).

The cases subsequent to *Rohan* have compounded and extended the error. In *Nash*, the Ninth Circuit extended the holding of *Rohan* to the right to be competent in a habeas *appeal* and to have the appeal stayed if the appellant/petitioner claims to be no longer able to communicate with appellate counsel. According

to the Ninth Circuit, "[w]hile an appeal is record-based, that does not mean that a habeas petitioner in a capital case is relegated to a nonexistent role. Meaningful assistance of appellate counsel may require rational communication between counsel and a habeas petitioner." *Id.* at 1050. In contrast, this Court has emphasized that in appellate proceedings it is "the superior ability of trained counsel in the examination into the record, research of the law, and marshalling arguments on [the appellant's] behalf" that benefits the defendant. *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (quoting *Douglas v. California*, 372 U.S. 353, 358 (1963)). This Court has never held that an appellant's assistance is necessary to winnow out weaker arguments on appeal and to focus on the ones more likely to prevail. Rather, this has been understood to be the role of counsel. *Jones*, 463 U.S. at 751-52.

In the instant case, the Ninth Circuit similarly extended this non-existent statutory right to apply "even though Gonzales's exhausted claims are record-based or legal in nature." Pet. App. A, at 2. The court surmised that "Gonzales's judicial bias claim could potentially benefit from the 'first-hand insight into the earlier proceedings' that a competent petitioner would be able to provide." Pet. App. A, at 5-6 (citing *Nash*, 581 F.3d at 1056). However, the court made no attempt to explain, in light of the existing record, how Gonzales's "first-hand insight" might have any legal significance. Under AEDPA, this is a record-based claim based on a state-court change of judge for-cause hearing, a claim that had been exhausted in Gonzales's direct appeal. *Gonzales*, 892 P.2d at 847-48.

Since *Rohan* was decided in 2002, no other federal circuit has found that Section 3599(a)(2) provides a death row petitioner with the general right to rationally communicate with counsel while seeking relief in a federal habeas proceeding and the right to a stay of the proceedings if competency is questioned.[5] That is hardly surprising, given that Congress did not speak to competence in the provision. Nonetheless, the 7 states in the Ninth Circuit that impose the death penalty are now subjected to a punishment-delaying rule, purportedly decreed by Congress, but which appears nowhere in the U.S. Code.

II. THE NINTH CIRCUIT'S INTERPRETATION OF § 3599(A)(2) CONFLICTS WITH EXISTING LAW AND TREATS SIMILARLY SITUATED HABEAS PETITIONERS DIFFERENTLY.

The Ninth Circuit's decisions in *Rohan*, *Nash*, and this case not only rewrite a federal statute; they conflict with existing law and mandate a regime that Congress could not possibly have intended.

A. The Ninth Circuit's reading of § 3599(a)(2) undermines Congress's purpose in enacting AEDPA.

This Court has recognized the practical considerations facing a habeas petitioner under a state's death sentence. Such petitioners "might deliberately engage in dilatory tactics to prolong their

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[5] The Seventh Circuit in the case of Eric D. Holmes proceeded as if such a right existed because the State of Indiana did not challenge it. *Holmes v. Buss*, 506 F.3d 576, 578 (7th Cir. 2007); *see also Holmes v. Levenhagen*, 600 F.3d 756 (7th Cir. 2010).

incarceration and avoid execution of the sentence of death." *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005). Thus, one of AEDPA's purposes is to reduce the delays in capital cases on habeas review. *Id.* at 276; *Garceau*, 538 U.S. at 206. Congress designed it to "streamline and simplify" federal habeas review. *Pace v. DiGuglielmo*, 544 U.S. 408, 427 (2005). The *Rohan* line of cases undercuts this Congressional purpose by building into the Ninth Circuit's habeas review an unnecessary opportunity for death row prisoners to stymie progress on the very habeas proceedings they initiated.

Before a state prisoner may present a claim for relief on federal habeas, he must have first fairly presented his federal claim to the state courts. 28 U.S.C. § 2254(b)(1); *see, e.g., O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). Under AEDPA, the merits rulings of the state courts are reviewed only to see if the state courts reasonably applied this Court's precedent and if the state court's decision was reasonable given the "evidence presented in the State court proceedings." 28 U.S.C. § 2254(d). The ability to expand the state-court record in the federal proceedings is very limited. 28 U.S.C. § 2254(e)(2); *Williams v. Taylor*, 529 U.S. 420, 424 (2000). Thus, Congress has created a scheme of federal review under which there is rarely a need to seek information from the state prisoner. A court-created right, that before a habeas case can proceed, the death row inmate must be able to rationally communicate with counsel markedly undermines Congress's attempt to streamline federal review in capital cases.

B. The Ninth Circuit's reading of § 3599(a)(2) conflicts with this Court's "next friend" jurisprudence.

In *Whitmore v. Arkansas*, 495 U.S 149, 165 (1990), this Court acknowledged the availability of "next friend" standing in limited circumstances if "the real party in interest is unable to litigate his own cause due to *mental incapacity*, lack of access to court, or other similar disability." (Emphasis added.) Implicit in that decision, which addressed a request for "next friend" standing to pursue a direct appeal in a capital case, is the recognition that mental incapacity does not require that an appeal be delayed indefinitely because of a convicted defendant's mental incapacity.

"Next friend" standing is a well-established practice. *See, e.g.*, 28 U.S.C. § 2242 (allowing a habeas petition to be filed "by someone acting" on behalf of the person seeking relief); *Munaf v. Geren*, 553 U.S. 674 (1008) (family members filed next-friend habeas petitions); *Demosthenes v. Baal*, 495 U.S. 731 (1990) (parents failed to establish inmate was not competent); *Gusik v. Schilder*, 340 U.S. 128 (1950) (father brought habeas petition on behalf of his minor son); *Odah v. United States*, 611 F.3d 8 (D.C. Cir. 2010) (Guantanamo Bay prisoner challenged his custody though his next friend). This accepted practice is inconsistent with the Ninth Circuit's decision to read a competency mandate into Section 3599(a). The practice next-friend recognizes that a habeas claim *can* proceed even if the petitioner himself is unable to participate.

C. The Ninth Circuit's reading of § 3599(a)(2) leads to disparate treatment of indigent and non-indigent capital petitioners.

There is no constitutional right to the effective assistance of counsel beyond the direct appeal stage of a state criminal proceeding. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 752 (1991). And 28 U.S.C. § 2254(i) expressly excludes "ineffectiveness or incompetence" of federal habeas counsel as a grounds for relief. Accordingly, there is no dispute that a non-indigent capital petitioner has no right to effective counsel and no right to be competent to assist counsel. Under the Ninth Circuit's reading of Section 3599(a)(2), however, indigent defendants have been given that latter right. The Ninth Circuit's decisions thus lead to the odd result that indigent and non-indigent capital petitioners have different rights to competence and different abilities to obtain stays while pursing relief in federal habeas.

There is no basis in AEDPA or Section 3599 to believe that Congress intended such a two-tiered approach to capital habeas cases. *Cf. Vermont v. Brillon*, 129 S. Ct. 1283, 1292 (2009) ("We see no justification for treating defendants' speedy-trial claims differently based on whether their counsel is privately retained or publicly assigned."). The provisions of 28 U.S.C. § 2254 apply to all "persons in custody pursuant to the judgment of a State court," not just indigent petitioners. Congress intended Section 3599(a)(2) to place indigent capital petitioners on comparable footing with non-indigent petitioners — not to grant them new and superior rights.

III. THE NINTH CIRCUIT'S RULING DEFEATS THE HABEAS GOAL OF CORRECTING UNCONSTITUTIONAL STATE COURT DECISIONS AND UNDERMINES THE STATES' INTEREST IN EXECUTING THEIR JUDGMENTS.

The Ninth Circuit's rule undercuts the very purpose of federal habeas review of state court judgments as well as the States' interest in finality by granting capital petitioners another means — authorized neither by the Constitution nor by statute — through which they can freeze review of their claims. The purpose of federal habeas review is to ensure that state courts comply with the United States Constitution in conducting criminal proceedings. *Graham v. Collins*, 506 U.S. 461, 467 (1993); *Sawyer v. Smith*, 497 U.S 227, 234 (1990). In pursuing federal habeas review, the very purpose of the state prisoner is to overturn the state-court judgment and thereby obtain relief. *Lockhart v. Fretwell*, 506 U.S. 364, 373 (1993). If a claim of incompetency is able to halt the federal review and consign the habeas petitioner to "habeas corpus limbo indefinitely" the purposes of federal habeas review have been defeated. *See Holmes v. Levenhagen*, 600 F.3d at 762-63. "[I]magine a capital defendant who has a slam-dunk habeas corpus claim that would not merely get him a new trial, but an acquittal; but because he is incompetent, he cannot communicate effectively with his lawyers or they with him." *Id.* at 763. "The implication is profoundly unsatisfactory." *Id.* at 672. Moreover, as Judge Posner observed, it is simply "odd to think that someone who initiates a [federal habeas] proceeding can then freeze it by claiming to be mentally incompetent." *Holmes v. Buss*, 506 F.3d at 578.

The benefits of the competency and stay right the Ninth Circuit read into Section 3599 are small. Under AEDPA, federal review is very limited—generally confined to federal exhausted record-based or legal claims. And even when the record is supplemented during federal habeas, it would be exceedingly unusual for the state prisoner to be the sole source of information, given the number of other actors involved in the criminal justice process. Generally, the prisoner's trial attorneys, investigators, and mitigation specialist are available, as are the prosecutors. Given the complexity of habeas litigation, it is highly improbable that the prisoner's habeas counsel would require the prisoner's assistance in district court, much less on appeal.

Moreover, Gonzales is protected from being executed if he is found incompetent under the *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986), standard. Under *Ford*, inmates sentenced to death may not be executed if "they are unaware of the punishment they are about to suffer and why they are to suffer it. . . ." *Penry v. Lynaugh*, 492 U.S. 302, 333 (1989) (internal quotes and cite omitted). That standard applies to all death row inmates and is universally applied throughout the federal circuits as well as the state courts. Because "[a]ll prisoners are at risk of deteriorations in their mental state," a *Ford* claim is, as a general matter, not ripe until an actual execution is set. *See Panetti v. Quarterman*, 551 U.S. 930, 943 (2007). The AEDPA statutory bar against successive habeas petitions does not apply to a *Ford* claim brought when the claim is first ripe. *Id.* at 947. Thus, if Gonzales is incompetent under *Ford*, he will not be

executed. Requiring a higher level of competency during his federal habeas proceedings adds an unsupportable additional gloss to the *Ford* right, and may deprive Gonzales of the opportunity to obtain timely relief on a meritorious claim.

By contrast, the costs of the Ninth Circuit's rule are great. This Court has repeatedly acknowledged the States' strong interest in the timely review of their death penalty cases in federal habeas. *See, e.g., Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Mayle v. Felix*, 545 U.S. 644, 657, 662 (2005).*Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004); *Calderon v. Thompson*, 523 U.S. 538, 655-56 (1998); *In re Blodgett*, 502 U.S. 236, 239-40 (1992) (*per curiam*). But as this Court has also recognized, capital petitioners have an incentive to adopt delaying tactics to avoid execution. *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005); *see also Evans v. Chavis*, 546 U.S. 189, 203 n.1 (Justice Stevens, concurring in judgment). The practical effect of the Ninth Circuit's rule is to aid those tactics.

The concrete examples of *Rohan* and this case illustrate the costs of the rule. Oscar Gates, the petitioner in *Rohan*, filed his federal habeas petition in July 1988. *Gates v. Woodford*, No. CV 88-02779-WHA (N.D. Cal.), at Doc. 1. Following the 2002 *Rohan* decision, additional litigation ensued until the case was stayed indefinitely in September 2004. *Id.* at Docs. 531-65. The last entry in the district court's docket is in January 2008. *Id.* at Doc. 579. Although the record does not reflect that Gates is incompetent under *Ford v. Wainwright*, it does reflect he is incompetent to assist counsel under *Rohan* (Doc. 565). Thus, although there is no clear authority from this

Court precluding his execution for his 1979 California murder, the State of California is effectively barred from proceeding with its judgment that has never been shown to be constitutionally infirmed.

In this case, more than 2 years elapsed while the parties awaited a Ninth Circuit decision on mandamus review of Gonzales's incompetent-to-assist-habeas-counsel claim. Should this Court deny certiorari, and should Gonzales be found incompetent, another round of litigation and appeals would likely follow regarding whether he can be forced to take medication that would restore him to competency. All this litigation, delay and expense are, of course, collateral to the purpose of federal habeas review as envisioned by Congress. Yet the case has now been under federal review for over a decade with untold years of future litigation. And if Gonzales is permitted to refuse medication, and if he never regains his competency to assist habeas counsel without such medication, the state will never be permitted to impose its judgment upon Gonzales—even if he would be permitted to be executed under the *Ford* standard.

Whether or not that result would be tolerable if Congress expressly mandated it, the result is manifestly intolerable at present. Congress has authorized counsel for indigent capital inmates seeking federal habeas review. It has not imposed an additional competency requirement backed by a stay of proceedings. This Court should not tolerate the Ninth Circuit's creation of that right.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In re: Ernest Valencia Gonzales,	)	
	)	
Ernest Valencia Gonzales,	)	No. 08-72188
Petitioner,	)	
v.	)	D.C. No.
United States District Court for	)	CV-99-02016-SMM
The District of Arizona,	)	
Phoenix,	)	
Respondent,	)	OPINION
	)	
Dora B. Schriro,	)	
Real-party-in-interest-	)	
Respondent.	)	
	)	

Petition for Writ of Mandamus

Filed October 20, 2010

Before: Stephen Reinhardt, Marsha S. Berzon and Milan D. Smith, Jr., Circuit Judges

Opinion by Judge Reinhardt

OPINION

REINHARDT, Circuit Judge:

Ernest Valencia Gonzales seeks a writ of mandamus

to stay his district court federal capital habeas proceedings under *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003). There, we held that when a capital habeas petitioner "raises claims that could potentially benefit from his ability to communicate rationally," *id.* at 819, his statutory right to counsel includes the right to competence during habeas proceedings. The district court denied Gonzales's motion for a competency determination under *Rohan* because "[Gonzales's] properly-exhausted claims are record-based and/or resolvable as a matter of law, irrespective of [his] capacity for rational communication with counsel," and therefore "cannot benefit from [his] personal input." Our recent decision in *Nash v. Ryan*, 581 F.3d 1048 (9th Cir. 2009), is to the contrary. In *Nash* we held that the prosecution of a habeas appeal that is record-based and resolvable as a matter of law can benefit from communication between client and counsel. *Id.* at 1054-55. Because we conclude that *Nash* controls this case, we hold that, although Gonzales's exhausted claims are record-based or legal in nature, he is entitled to a stay pending a competency determination.

I.

In 1991, Gonzales was convicted of first-degree murder and sentenced to death. After pursuing state remedies, he sought a writ of habeas corpus in federal district court in November 1999. On February 23, 2006, after the district court had resolved the procedural status of Gonzales's claims and established a deadline for his merits briefing of non-procedurally barred claims, Gonzales's counsel moved to stay the proceedings pending a competency determination

pursuant to *Rohan*, 334 F.3d at 814-15. Gonzales's attorneys indicated that their client's assistance was essential to a number of his remaining habeas claims, and that due to a progressive deterioration in Gonzales's mental health he had lost the ability to rationally communicate with his counsel and assist them.

In response, the district court initiated proceedings to determine Gonzales's competency and ordered the parties to submit expert reports on Gonzales's mental health. The district court granted the government's motion to transfer Gonzales to Arizona State Hospital for an extended mental health assessment. The product of that assessment, a report by supervising psychologist Dr. James Seward, expressed "reservations concerning the veracity of Mr. Gonzales's symptoms," but concluded that he suffered from a "genuine psychotic disorder" and was "currently . . . unable to communicate rationally for any extended period of time, such as would be required by a legal proceeding."

Gonzales's attorneys submitted to the district court a list of pending habeas claims that they contended could benefit from rational communication with their client, including a claim that Gonzales's Sixth Amendment rights were violated because the trial judge was openly hostile toward Gonzales and refused to recuse himself. The district court determined that Gonzales was not entitled to a stay under *Rohan* even if he had a psychotic condition rendering him incompetent to confer with counsel. The district court held that Gonzales's claims, including his claim of judicial bias, were all "record-based and/or resolvable as a matter of

law," and accordingly could not benefit from his ability to communicate rationally with counsel, as required by *Rohan*. 334 F.3d at 818-19. Having so ruled, the district court did not hold a hearing to determine whether Gonzales was in fact incompetent to communicate meaningfully with counsel for purposes of a habeas proceeding.

Gonzales filed an emergency petition for a writ of mandamus, and we ordered a temporary stay of the district court's proceedings to allow us to consider the petition. We also stayed our own proceedings pending the resolution of *Nash*. Having issued our decision in *Nash*, we now lift the stay on our proceedings and address the merits of Gonzales's petition for mandamus.

II.

[1] *Nash* held that the prosecution of a capital habeas appeal, which is necessarily confined to the record, could benefit from communication between client and counsel. 581 F.3d at 1050 ("While an appeal is record-based, that does not mean that a habeas petition in a capital case is relegated to a nonexistent role."). Specifically, we concluded that Nash's claim of ineffective assistance of counsel could benefit from his ability to communicate rationally with counsel even though his appeal was record-based. 581 F.3d at 1055. We held that

> [t]he need for rational communication here is particularly important because Nash has been assisted by several attorneys over the years .... The information that Nash possesses would

> provide first-hand insight into the earlier proceedings, insight that might be helpful in ways that Nash's current attorneys cannot currently identify because of his alleged incompetence.

Id. at 1055-56.

[2] *Nash* squarely controls this case, foreclosing the district court's conclusion that a stay under *Rohan* is categorically unavailable when a capital habeas petitioner's claims consist only of record-based or legal questions. *Id.* at 1050. Rather than relying upon categorical rules, Nash made clear that the "inquiry should be whether rational communication with the petitioner is essential to counsel's ability to meaningfully prosecute" a capital habeas claim. *Id.* at 1054. Had the district court undertaken the claim-specific inquiry required by *Nash*, he would have been compelled to conclude that "communication with [Gonzales] is essential to counsel's ability to meaningfully prosecute" Gonzales's habeas claims. *Id.* Gonzales, like Nash, "has been assisted by several attorneys over the years" — in fact, he had eleven different attorneys over the course of his trial and sentencing, and was self-represented for part of that time. Gonzales's claim of judicial bias centers on events regarding which "counsel may . . . need to communicate with [Gonzales] to understand fully the significance and context" of key facts so that counsel can pursue the most persuasive arguments. *Nash*, 581 F.3d at 1048. Thus, no less than Nash's claim of ineffective assistance of counsel, Gonzales's judicial bias claim could potentially benefit from the "first-

hand insight into the earlier proceedings" that a competent petitioner would be able to provide. *Nash*, 581 F.3d at 1056.

[3] *Nash* thus compels the conclusions that Gonzales has raised at least one claim that could potentially benefit from rational communication with counsel and that he is accordingly eligible for a stay under *Rohan*.

III.

[4] We consider five factors when deciding whether to grant mandamus relief: (1) whether the petitioner has no other adequate means, such as direct appeal, to secure relief; (2) whether he will suffer damage not correctable on appeal from final judgment; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the order represents an oft-repeated error by the district court; and (5) whether the order raises new and important problems or legal issues of first impression. *See Bauman v. U.S. Dist. Court*, 57 F.2d 650, 654-55 (9th Cir. 1977). The five Bauman factors "serve only as a useful starting point," rather than an exhaustive set of considerations. *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1301 (9th Cir. 1982). We may also consider, for example, "whether there are other compelling factors relating to the efficient and orderly administration of the district courts." *Id.*

Rarely if ever will there be a case in which every one of the five *Bauman* factors indicates the same result or is relevant or applicable. *See Bauman*, 557 F.2d at 655. For example, factors (4) and (5) are in direct

conflict with each other, and it would appear to be impossible to meet both criteria in the same case. Accordingly a showing of less than all of the *Bauman* factors, indeed of only one, does not mandate denial of the writ. *See Cole v. United States Dist. Court*, 366 F.3d 813, 817 (9th Cir. 2004). While the absence of clear error ordinarily will defeat a petition for writ of mandamus, *DeGeorge v. United States District Court*, 219 F.3d 930, 934 (9th Cir. 2000), when a mandamus petition "raises an important issue of first impression . . . a petitioner need show only 'ordinary (as opposed to clear) error.'" *San Jose Mercury News, Inc. v. United States District Court*, 187 F.3d 1096, 1100 (9th Cir. 1999); *see also In re Cement Antitrust Litig.*, 688 F.2d at 1307 ("[W]e see no legitimate reason for refraining from exercising our supervisory authority where we can determine that an error has been made but cannot, for whatever reason, characterize the error as 'clearly' erroneous").

[5] This is a supervisory mandamus case, presenting an issue important to "proper judicial administration in the federal system." *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 259-260 (1957). "Certain concepts related to the traditional use of mandamus are not necessarily applicable in supervisory mandamus cases, or, at the least, are applied differently." *In re Cement Antitrust Litig.*, 688 F.2d at 1301. Mandamus relief may be appropriate in supervisory mandamus cases even if Bauman's second factor — that the error cannot be corrected on appeal from the final judgment — is absent. *LaBuy*, 352 U.S. at 254-55. "[I]n supervisory mandamus cases involving questions of law of major importance to the district courts, the purpose of our

review — and the reason for our correcting an error made by a trial judge — is to provide necessary guidance to the district courts and to assist them in their efforts to ensure that the judicial system operates in an orderly and efficient manner." *In re Cement Antitrust Litig.*, 688 F.2d at 1307.

[6] We conclude that this is the type of case compelling the exercise of our supervisory mandamus power, because the district court's erroneous refusal to stay proceedings in this capital case raises the prospect of months, if not years, of habeas proceedings that will almost certainly be vacated or reversed. The *Bauman* factors support this conclusion. As to the first *Bauman* factor, it is not clear that Gonzales has any "other adequate means, such as a direct appeal, to attain the relief he . . . desires." *Bauman*, 557 F.2d at 654. Although Gonzales could appeal the district court's stay denial if his habeas petition were ultimately denied, in order to succeed on such an appeal he would have to establish his incompetency retrospectively. The Supreme Court has emphasized that such retrospective competency determinations are inherently difficult even "under the most favorable circumstances," *Drope v. Missouri*, 420 U.S. 162, 183 (1975), and this court views them with disfavor. *See, e.g., Moran v Godinez*, 57 F.3d 690, 696 (9th Cir. 1994) (recognizing that when a court erroneously fails to hold a contemporaneous competency hearing "it often may be impossible to repair the damage retrospectively") (superseded on other grounds by statute as described in *McMurtrey v. Ryan*, 539 F.3d 1112, 1119 (9th Cir.

2008).[1] Given the disfavored character of retrospective competency evaluations, an appeal at the end of Gonzales's district court proceedings can hardly be deemed an adequate alternative means of relief for Gonzales. The second *Bauman* factor is satisfied for similar reasons; while we can only speculate as to how the difficulties of retrospective evaluation would affect Gonzales's case, to force him to accept a disfavored and inherently difficult retrospective competency evaluation, rather than staying proceedings and conducting a contemporaneous evaluation as required by *Rohan* and *Nash*, would in itself serve to impose upon him "damage not correctable on appeal." *Bauman*, 557 F.2d at 654. Third, because this is a supervisory mandamus case, Gonzales need only show that the district court has committed ordinary legal error. *In re Cement Antitrust Litig.*, 688 F.2d 1297 at 1301.

The petition for a writ of mandamus is GRANTED.

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[1] We recognize that we have allowed retrospective competency determinations in circumstances where, as here, contemporaneous medical and psychiatric reports exist. *See Moran*, 57 F.3d at 696-98; *Odle v. Woodford*, 238 F.3d 1084, 1089 (9th Cir. 2001) (citing *de Kaplan v. Enomoto*, 540 F.2d 975, 986 & n.11 (9th Cir. 1976)). But even in such cases, we have emphasized the limitations of such for a contemporaneous determination.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Ernest Valencia Gonzales,	)	
	)	No. CV-99-2016-
Petitioner,	)	PHX-SMM
	)	
vs.	)	DEATH PENALTY
	)	CASE
Dora B. Schriro, et al.,	)	
	)	
Respondents.	)	ORDER
	)	

Pursuant to the Ninth Circuit's Amended Order Filed July 17, 2008, in Case No. 08-72188, this Court has prepared the attached Supplemental Response for filing in the Ninth Circuit Court of Appeals.

IT IS THEREFORE ORDERED that the Clerk of Court send the original and three copies of the attached Supplemental Response to the Clerk of the Ninth Circuit Court of Appeals, Attn: Pinky Argonza, U.S. Court of Appeals, P.O. Box 193939, San Francisco, CA 94119-3939.

DATED this 28th day of August, 2008.

s/_____
Stephen M. McNamee
United States District Judge

APPENDIX H

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERNEST VALENCIA GONZALES, Petitioner, v. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, Respondent, DORA B. SCHRIRO, Real party in interest.	No. 08-72188 D.C. No. 2:99-cv-02016-SMM D.Ariz. DISTRICT COURT'S SUPPLEMENTAL RESPONSE PURSUANT TO NINTH CIRCUIT AMENDED ORDER FILED JULY 17, 2008

Petitioner Ernest Valencia Gonzales has filed in the Ninth Circuit Court of Appeals an Emergency Petition for Writ of Mandamus challenging this Court's order of April 23, 2008, denying his motion for a competency hearing pursuant to *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003). At the invitation of the Ninth Circuit Court of Appeals, Respondent District Court submits the following

response to Petitioner's Supplemental Brief to Petition for Mandamus.[1]

Relevant Background

Petitioner was convicted of first-degree murder in 1991 and sentenced to death in 1992. Following affirmance on direct appeal Petitioner filed a petition and a supplemental petition for post-conviction relief (PCR), which were denied by the state courts. Petitioner initiated this habeas proceeding in 1999 and in 2000 filed a 237-page amended petition raising sixty claims for habeas relief. (Dkt. 28.) In 2001, Petitioner, having withdrawn a number of his habeas claims, again sought state post-conviction relief.[2] In these proceedings, PCR counsel raised the issue of Petitioner's competence to assist counsel, a claim

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[1] Although the Court questions applicability of the collateral order doctrine to denial of a *Rohan* hearing, this Response does not otherwise address the jurisdictional issues presented by Petitioner's motion. However, the Court takes this opportunity to note its view of the significance of the "final decision," rule, under which "a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994). In the Court's estimation, taking into account case management issues and the use of judicial resources, the final decision rule fosters continuity and the efficient administration of justice by preventing fragmentation of the case and piecemeal litigation. This is especially true for *Rohan*-related allegations where access to the full district and state court records may be necessary to resolve the disputed issues.

[2] The Court set out a more detailed discussion of this procedural history in its April 23 order. (Dkt. 187 at 16-18.)

which the state court rejected as not cognizable. (Dkt. 108, Exs. 2, 3.) In 2002, following the Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), the Court stayed Petitioner's sentencing-related claims pending litigation in state court on applicability of *Ring* to Petitioner's case. In 2003, three years after the appointment of habeas counsel, Petitioner began to refuse visits from his attorneys. (Dkt. 102, Ex. A.) In 2004, the Supreme Court held in *Summerlin v. Schriro*, 542 U.S. 348 (2004), that *Ring* does not apply retroactively to cases such as Petitioner's that were final when *Ring* was decided.

At the time Petitioner initiated this habeas proceeding, the District's practice for all capital cases was to limit the State's answer to procedural defenses so that the Court could first assess whether any of Petitioner's claims were procedurally barred before requiring an answer on the merits of the claims. After the Supreme Court decided *Summerlin*, stays were lifted on a multitude of cases in this District and the Court, in January 2006, determined the procedural status of the claims raised in Petitioner's amended petition, finding that only thirty-one were appropriate for merits review. (Dkt. 97.) In view of the length of time that had passed since Petitioner filed his amended petition and the petition's failure to identify claims for which Petitioner believed further evidentiary hearing was warranted, the Court provided Petitioner the opportunity to file an opening merits brief in which he was to (1) "specifically identify and apply appropriate AEDPA standards of review" to each claim for relief and (2) identify the claims requiring further evidentiary development, the facts or evidence

sought to be developed, and the reasons these facts were not developed in state court. (*Id.* at 36.) The Court's intent was to simply provide an opportunity for up-to-date legal citation and argument in support of the properly exhausted claims raised in the then-six-year-old petition, not to provide a second opportunity to investigate the case in search of claims not raised in the petition.[3]

On the eve of the Court's deadline for Petitioner's opening merits brief, counsel filed a *Rohan* motion for a competency determination and a stay. Initially, based primarily on counsel's avowals in the motion, the Court set the matter for an evidentiary hearing. (Dkt. 131.) The hearing was vacated when the Court granted Respondents' unopposed motion to

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[3] Petitioner asserts in his supplemental brief that "to go forward without the capacity for rational communication would lead to an adjudication of the federal petition that does not include all material facts or meritorious claims that might entitle Petitioner to relief or spare him from execution." (Pet.'s Supp. Br. at 32-33.) However, the merits brief is not the place to raise new facts or claims. Rather, Petitioner was obligated under this Court's 1999 order, citing *McCleskey v. Zant*, 499 U.S. 467, 498 (1991), as well as Rule 2 of the Rules Governing Section 2254 Cases, to set forth in his amended petition "every known constitutional error," including the legal *and* factual basis for each ground for relief. (Dkt. 17.) Counsel subsequently filed an exhaustive amended petition and at no point indicated that communication difficulties with Petitioner inhibited this effort. In light of Petitioner's opportunities in both state and federal court to raise claims (prior to the allegation of incompetency in 2001), there is a strong probability he is foreclosed at this point both under state law and the AEDPA statute of limitations from raising any new claims based on facts within his personal knowledge. *See* Ariz. R. Crim. P. 32.1 & 32.2; 28 U.S.C. § 2244(d).

transfer Petitioner to the Arizona State Hospital for further evaluation. (Dkt. 147.) Thereafter, the issue of forced medication arose when Petitioner withdrew from a regimen of anti-psychotic medication despite the apparently positive effects of that medication. (*See* Dkt. 164.) Following the evaluation period, the Court held status conferences on October 15 and December 3, 2007; the Court then ordered additional briefing, including on the issue of *Rohan*'s applicability to Petitioner's properly-exhausted habeas claims. (Dkt. 180.) Upon reviewing the parties' briefs and all of the mental health information, the Court further reviewed the entire state court record to determine whether, according to the principles set forth in *Rohan*, a competency determination and stay were necessary.

Petitioner complains that the Court executed a "rapid about-face" when it asked for additional briefing and failed to reset the competency hearing. (Pet.'s Supp. Br. at 22.) The Court's course of action was dictated by several concerns. First, it was apparent after the evaluation period that the experts had reached a tentative consensus regarding Petitioner's mental health – *i.e.*, that in the absence of medication he was largely incapable of communicating rationally with counsel. Having received such information, the Court reconsidered the potential utility of holding an evidentiary hearing, determining that the value of such a hearing was significantly diminished, particularly when balanced against the expenditure of scarce judicial resources. In addition, on October 30, 2007, the Seventh Circuit issued its opinion in *Holmes v. Buss*, 506 F.3d 576 (7th Cir. 2007), which provided further guidance on the application of the *Rohan*

standard.

The court in Holmes, proceeding on the assumption that Rohan was correctly decided, echoed the Ninth Circuit's distinction between claims that could potentially benefit from a habeas petitioner's input and those to which "a lay person has nothing to contribute." 506 F.3d at 579. With these developments in mind and assuming Petitioner's incompetency, the Court refocused on the nature of Petitioner's claims and the way they fit into the framework sketched out in *Rohan*, a process that included most significantly, a close review of both Petitioner's remaining claims and the state court record. The Court then issued its order denying a competency hearing, finding that Petitioner's claims were record-based and involved purely legal issues and therefore would not potentially benefit from his ability to communicate rationally with counsel. (Dkt. 187.)

Application of Rohan

In *Rohan* the Ninth Circuit determined that a prisoner "has a statutory right to competence in his federal habeas proceedings." 334 F.3d at 817. The "relevant question" in determining competence in the federal habeas context is "whether [the petitioner] now has the capacity to understand his position and to communicate rationally with counsel." *Id.* at 819. Thus, "where an incompetent capital habeas petitioner raises claims that could benefit from his ability to communicate rationally, refusing to stay proceedings pending restoration of competence denies him his statutory right to assistance of counsel, whether or not

counsel can identify with precision the information sought." *Id.* (emphasis added).

This Court's April 23 order was based upon its understanding of that holding and informed by the few cases that have interpreted and applied *Rohan*, primarily *Holmes*. As just noted, these cases distinguish between claims that might potentially benefit from a habeas petitioner's ability to communicate rationally and those that are "record-based or non-factual," *Rohan*, 334 F.3d at 819 n.11, and do not implicate a petitioner's "private knowledge" or "personal history," *id.* at 818. As an example of the former category of claims, *Rohan* and *Holmes* note that allegations of ineffective assistance of counsel, particularly in the gathering of mitigation information, often depend on information outside the record for which the petitioner might be the only source. *Id.* at 818; *see Holmes*, 506 F.3d at 579-80.

In response to this Court's orders, Petitioner's counsel twice have identified the claims to which they believe the holding in *Rohan* applies – *i.e.*, those which might benefit from Petitioner's ability to communicate rationally. (Dkts. 102, 184.) With one possible exception, all of these claims are record-based or involve purely legal issues, such as claims challenging Arizona's death penalty statute or the sufficiency of evidence with respect to aggravating factors; there are no allegations of ineffective assistance that could benefit from Petitioner's personal input, and Petitioner withdrew his claim of ineffective assistance of counsel at sentencing. (Dkt. 43.)

The single exception is Petitioner's claim of judicial bias. *See Holmes*, 506 F.3d at 580 (prosecutorial misconduct claim could potentially benefit from Petitioner's competence because he may "be able to convey to his lawyers a better sense of the alleged misbehavior of the prosecutor and of defense counsel than the trial transcript and other documentation provide"). However, as the Court discussed extensively in its April 23 order, it is clear from a review of the state court record that the factual underpinnings of that claim were fully developed in state court and the record on the issue is complete. (*See* Dkt. 187 at 7-11.)

The Court believes that its analysis receives additional support from the recent holding in *United States v. Paul*, No. 05-3431, 2008 WL 2796725 (8th Cir. Jul. 22, 2008), a § 2255 case in which the Eighth Circuit denied a certificate of appealability on the issue of a habeas petitioner's statutory right to competence.[4]

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[4] No other Circuit has adopted the holding in *Rohan*, and in *Paul* the Eighth Circuit expressed skepticism about the existence of a statutory right to competence for habeas petitioners, noting that its reaction to the claim is similar to that of the Seventh Circuit in *Holmes*:

> As a matter of first impression, we might doubt the legal significance of a person's lacking the mental competence to prosecute, or to assist his lawyer in prosecuting, a federal habeas corpus proceeding. Technically, habeas corpus is a civil proceeding rather than a criminal one. Realistically, it is a stage initiated by the criminal defendant rather than by the state; and it is odd to think that someone who initiates a proceeding can then freeze it by claiming to be mentally incompetent.

(Continued)

The Eighth Circuit explained:

> At least on the facts of this case, we are not persuaded that the certificate of appealability should be expanded to encompass Paul's claim of a statutory right to competence. Paul alleges that his incompetence arose after his attempted suicide in November 2003. As of that date, however, Paul already had filed his 344-page habeas corpus motion and a 514-page, two-volume appendix on December 17, 2002. The government had responded on June 2, 2003, and the court issued its decision based on those lengthy pleadings. To the extent counsel needed assistance from Paul in developing facts outside the record, that work was completed before November 2003.
>
> This is not a situation, therefore, where counsel must speculate about what the petitioner might have told him if the petitioner had been competent when the post-conviction arguments were formulated. *Cf. Rohan*, 334 F.3d at 818. If there is a statutory right to competency in post-conviction proceedings, the scope of the right must correspond to what mental capabilities the litigant needs to assist in the conduct of the litigation. *See Holmes v. Buss*, 506 F.3d 576, 581 (7th Cir. 2007). Once a habeas corpus motion is submitted to the court,

(Continued).

Paul, 2008 WL 2796725 at *13 (quoting *Holmes*, 506 F.3d at 578.

> and the parties are merely awaiting a decision, there is no need for rational communication between counsel and client in furtherance of the motion.

Id. at *12 (footnote omitted).

In Petitioner's case, eight years passed between his conviction and sentencing and the filing of his amended habeas petition in 2000. The request for a competency determination was not filed until 2006. During this fourteen-year period, Petitioner, represented by counsel, proceeded through the direct appeal and post-conviction processes in state court and filed a lengthy habeas petition. Based upon this record, it is difficult to posit the existence of additional factual allegations or new legal claims which are dependent upon Petitioner's ability to communicate rationally with counsel. Like the petitioner in *Paul*, Petitioner's "alleged incompetence did not bar [him] from presenting his . . . claims." *Paul*, 2008 WL 2796725 at *12.

In sum, the Court has endeavored to follow *Rohan*. In doing so, the Court accepted Petitioner's contention that he is not presently competent to communicate rationally with counsel but found this fact irrelevant because none of the claims remaining to be decided by this Court are ones that "could benefit from his ability to communicate rationally." *Rohan*, 334 F.3d at 819. In light of that determination, the Court concluded that there was no valid reason for delaying resolution of Petitioner's claims.

The Court is mindful that the issue of Petitioner's competency may ultimately need to be addressed. Thus, if Petitioner fails to obtain relief on his pending claims, he is not precluded from seeking relief from his capital sentence pursuant to *Ford v. Wainwright*, 477 U.S. 399 (1986), as that claim was expressly dismissed by the Court as premature in its January 2006 order (Dkt. 97 at 33). *See Martinez-Villareal v. Stewart*, 118 F.3d 628, 634 (9th Cir. 1997), *aff'd*, 523 U.S. 637 (1998) (*Ford* claim raised and dismissed as premature in first petition may be re-raised in second or successive petition). Therefore, to the extent that a final determination concerning Petitioner's competence is not foreclosed, no prejudice will accrue to Petitioner from the Court's handling of the *Rohan* issue.

DATED this 28th day of August, 2008.

s/_____
Stephen M. McNamee
United States District Judge

A hard copy of this Response was mailed on this date to the Clerk of Court for the Ninth Circuit, Office of the Clerk, U.S. Court of Appeals, P.O. Box 193939, San Francisco, CA 94119-3939.

Electronic service was provided to the following parties through the District of Arizona's ECF System:

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Ernest Valencia Gonzales,	
	No. CV-99-2016-PHX-SMM
Petitioner,	
vs.	DEATH PENALTY CASE
Dora B. Schriro, et al.,	
Respondents.	ORDER

Before the Court is Petitioner's Motion for Competency Determination and to Stay Proceedings. (Dkt. 102.)[1] For the reasons set forth herein, the motion is denied.

BACKGROUND

On November 15, 1999, Petitioner, an Arizona inmate sentenced to death, commenced these proceedings by filing a petition for a writ of habeas corpus. (Dkt. 1.) The Court appointed the Federal Public Defender's Office to represent Petitioner. (Dkt. 8.) On December 21, 1999, the Court issued a case management order setting a deadline for the filing of

[1] "Dkt." Refers to the documents in this Court's file.

an amended petition. (Dkt. 17.) Citing Rule 2 of the Rules Governing § 2254 Cases, the order required the amended petition to "include every known constitutional error or deprivation entitling Petitioner to habeas relief" and to "set forth, in a clear and concise fashion, the legal and factual basis for each ground for relief. The factual basis shall include full citations to the appropriate portions of the record." (*Id.*) On July 17, 2000, Petitioner filed a 237-page first amended petition raising sixty claims. (Dkt. 28.) Petitioner subsequently withdrew thirteen unexhausted claims from the amended petition so that he could pursue them in state court. (Dkt. 43.) The parties thereafter completed briefing on the procedural status of the remaining claims. (See Dkts. 47,48, 54, 59.)

On January 12, 2006, the Court entered its order regarding the procedural status of the claims submitted in the amended petition. (Dkt. 97.) The Court dismissed certain claims and established a deadline for Petitioner to submit briefing on the merits of the remaining claims. (*Id.*) On February 23, 2006, prior to the deadline for filing his merits brief, counsel for Petitioner moved to stay this action pursuant to *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003), contending that Petitioner was no longer capable of rationally communicating with or assisting habeas counsel. (Dkt. 102.) The motion indicated that since October 2003 Petitioner had refused some twenty-six attempted visits from habeas counsel and support staff, who wished to "discuss these upcoming proceedings, including merits briefing and requests for evidentiary development." (*Id.* at 5-6.) Counsel

indicated that they needed Petitioner's assistance in order to brief the merits of a number of claims. (Dkts. 102, 108.) Following Petitioner's *Rohan* motion, and based upon the Court's initial review of the allegations and evidence concerning Petitioner's mental state, the Court allowed an evaluation of Petitioner's competence to proceed, and each party enlisted a mental health expert. (Dkt. 111.)

The parties' experts, both psychiatrists, reached conflicting conclusions. Respondents' expert, Dr. Anna Scherzer, performed an independent psychiatric consultation, which included an eight-hour interview and the administration of a number of assessment instruments, and prepared a detailed thirty-page report. (Dkt. 124.) Dr. Scherzer concluded to a reasonable degree of medical/psychiatric certainty that Petitioner "has the capacity to understand his legal position" and "has the capacity to communicate in a comprehensible manner." (*Id.* at 1.) She noted that "[a]s the interview progressed, Mr. Gonzales demonstrated periods of reflection, normal speech pattern, conversationally appropriate amplitude and logical appreciation of the reality of his circumstances, . . . demonstrate[ing] awareness of the central issue of when the government would carry out the already imposed death penalty." (*Id.* at 29.) Dr. Scherzer also explained that the results of the instruments she administered were "consistent with volitional feigning and malingered exaggeration of symptom [sic] of mental illness" and "were not consistent with expected patterns of known psychiatric disorders." (*Id.* at 2-3.) Furthermore, according to Dr. Scherzer, Petitioner acknowledged that "he has volitionally chosen not to

communicate with his attorney," and "he verbalized his desire to be found incompetent, (and thereby delay or avoid death by lethal gas)." (Dkt. 124 at 2.) However, while in Dr. Scherzer's professional opinion Petitioner "is knowingly choosing to present himself as severely mentally ill, this does not exclude the presence of a psychiatric disorder." (*Id.* at 29.) Dr. Scherzer recommended a period of "locked mental health observation" to determine if Petitioner's symptoms were indeed feigned and, if the symptoms persisted, treatment with "atypical neuroleptics and mood stabilizing psychotropic medication." (*Id.* at 30.)

Petitioner's expert, Dr. Raphael Morris, after conducting a two-hour "psychiatric interview" and reviewing various records, diagnosed Petitioner with Schizophrenia, Disorganized Type and concluded that he "lacks the capacity to rationally communicate with counsel due to a disorganized thought process and a pressured and non-redirectable pattern of speech. In addition his current grandiose delusions interfere with his capacity to appreciate his current legal predicament." (Dkt. 125 at 2, 10.) Dr. Morris found, contrary to Dr. Scherzer, that Petitioner "is unable to have a coherent discussion about even the most benign topics much less provide input towards the defense team's investigations." (*Id.* at 10.) Dr. Morris recommended a course of anti-psychotic medication but characterized Petitioner's "prognosis for restoration of competency" as "guarded at best." (*Id.* at 2-3, 12).

After receiving the reports from Drs. Scherzer and Morris, the Court scheduled an evidentiary hearing. (Dkt. 131.) Prior to the hearing, however,

Respondents filed a motion requesting that Petitioner be transferred to the Arizona State Hospital ("ASH") for an extended mental health assessment; the Court granted the motion. (Dkts. 138, 147.) On October 10, 2007, at the end of the ninety-day assessment period, the supervising psychologist, Dr. James Seward, submitted a final report. Dr. Seward indicated that he "continue[d] to have reservations concerning the veracity of Mr. Gonzales's symptoms" and that "malingering cannot be ruled out." (Dkt. 160 at 1, 3.) Nevertheless, he concluded that Petitioner has a "genuine psychotic disorder" and is "currently unable to communicate rationally for any extended period of time, such as would be required by a legal proceeding." (*Id.* at 2). Dr. Seward became persuaded that Petitioner's symptoms were genuine after observing an improvement in Petitioner's capacity for rational thought during the brief period when Petitioner was compliant with a regimen of the antipsychotic medication, Aripiprazole, which was prescribed by his treating psychiatrist, Dr. Qureshi. (*Id.* at 2-3.) Despite the observations of Drs. Seward and Qureshi, and Petitioner's self-report that he had experienced "some benefit . . . regarding his thought processes," Petitioner asked to be taken off the medication, complaining of side effects such as back pain and restlessness.[2] (*Id.* at

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[2] According to Dr. Seward, "full benefit from antipsychotic medication is expected within four to six weeks after initiation of treatment." Petitioner took Aripiprazole for approximately three weeks before discontinuing treatment. (Dkt. 160 at 3.)

Dr. Seward noted that in his most recent session with Petitioner, possibly as a result of the antipsychotic mediation, Petitioner "demonstrated more capacity for rational thought than he has in our previous meetings." (*Id.*) "For the first 30 minutes

(Continued)

2.) Upon receiving Dr. Seward's report and being informed that Petitioner had discontinued treatment with this potentially beneficial medication, the Court ordered briefing on the issue of involuntary administration of antipsychotic medication. (Dkt. 164.)

On October 15 and December 3, 2007, the Court held status hearings to address these latest developments. At the hearings, the discussion focused on the holdings in two cases. In *Rohan*, 334 F.3d at 819, the Ninth Circuit held that capital habeas proceedings must be stayed, "pending restoration of competence," where a petitioner is unable to communicate rationally with counsel regarding claims that could benefit from such communication. In *Sell v. United States*, 539 U.S. 166, 169 (2003), the Supreme Court addressed the question "whether the Constitution permits the Government to administer antipsychotic drugs involuntarily to a mentally ill criminal defendant – in order to render that defendant competent to stand trial for serious, but nonviolent, crimes." The Court held that in limited circumstances forcible medication was permissible and established the analytical framework under which such determinations are made. *Id.*

In briefing completed prior to the December 3 status conference, Petitioner maintained that he was

(Continued).

of this contact he primarily related in a socially appropriate, rational, and coherent manner, with minimal disorganized and illogical thoughts." (*Id.* at 2.) However, for reasons Dr. Seward cannot explain, Petitioner then became hostile and irrational. (*Id.*)

incompetent under *Rohan* and that, pursuant to the criteria set forth in *Sell,* he could not be restored to competency through involuntary medication. (Dkt. 177.) Noting that the issue involved – whether a habeas petitioner, convicted of a violent crime, could prevent action on his own petition by refusing to be restored to competence – was one of first impression, the Court ordered additional briefing on a number of questions. (Dkt. 180.) The initial question asked Petitioner to identify the specific claims and types of assistance "needed from Petitioner – beyond that already provided and submitted as part of the Amended Petition – to complete preparation of the merits brief and any requests for evidentiary development," explaining that such "information is necessary for any determination regarding Petitioner's ability to communicate rationally with counsel as required under *Rohan.* (*Id.* at 2.) That briefing has been completed. (Dkts. 184, 185, 186.)

DISCUSSION

1. *Rohan* holding

As noted above, the Ninth Circuit in *Rohan* determined that a prisoner "has a statutory right to competence in his federal habeas proceedings." 334 F.3d at 817. The "relevant question" in determining competence in the federal habeas context is "whether [the petitioner] now has the capacity to understand his position and to communicate rationally with counsel." *Id.* at 819. Thus, "where an incompetent capital habeas petitioner raises claims that could benefit from his ability to communicate rationally, refusing to stay

proceedings pending restoration of competence denies him his statutory right to assistance of counsel, whether or not counsel can identify with precision the information sought." *Id.* Accordingly, in such a situation, federal habeas proceedings "must be stayed until [the petitioner] is competent." *Id.* Finally, the Ninth Circuit was careful to note that "the mere fact that [a petitioner] does not communicate rationally does not mean that he is *incapable* of doing so." *Id.*

Other circuits have acknowledged the holding in *Rohan*, but have not been called upon to approve or reject it. *See Holmes v. Buss*, 506 F.3d 576, 578 (7th Cir. 2007); *Mines v. Dretke*, 118 Fed.Appx. 806, 812-13 (5th Cir. 2004); *see also Clayton v. Roper*, 515 F.3d 784, 790 n.2 (8th Cir. 2008). These cases distinguish between claims for which a petitioner's personal input may be beneficial and those that are "record-based or non-factual," *Rohan*, 334 F.3d at 819 n.11, or are otherwise not susceptible to the contributions of a lay person. In *Rohan*, for example, the Ninth Circuit noted that an ineffective assistance of counsel claim, which "depends in large measure on facts outside the record," could "potentially benefit from [the petitioner's] assistance." 334 F.3d at 818. The court specifically noted that ineffective assistance claims challenging counsel's performance with respect to a defendant's competence to stand trial or the gathering of mitigating evidence may be supported by information in the petitioner's "private knowledge" or from his "personal history." *Id.*; *see Hill v. Ayers*, No. 4-94-CV-641-CW, 2008 WL 683422 (N.D. Cal Mar. 10, 2008)(noting that the petitioner "has 'raised claims that could benefit from his ability to communicate

rationally,' such as claims of innocence and ineffective assistance of counsel in presenting mitigating evidence at the penalty phase of his trial")(quoting *Rohan*, 334 F.3d at 818). In *Holmes*, the Seventh Circuit drew a similar distinction between claims requiring a petitioner's input and those for which his assistance is unnecessary:

> Federal habeas corpus happens to be one of the most complex areas of American law. With respect to many of the issues that arise in habeas corpus cases, a lay person has nothing to contribute to his lawyer's strategy. But it can be different with respect to other issues, several presented in this case, notably prosecutorial misconduct at trial and ineffective assistance by trial counsel. The petitioner was at his trial; his current lawyers were not. He may – if mentally competent – be able to convey to his lawyers a better sense of the alleged misbehavior of the prosecutor and of defense counsel than the trial transcript and other documentation provide.

506 F.3d at 579-80.

II. Claims to which Petitioner contends *Rohan* applies

Petitioner argues that Claims 9, 13, 17, 29, 30, and 34 may potentially benefit from his ability to communicate rationally with counsel because each are based on extra-record information that is within his personal knowledge. (Dkt. 184 at 10-15.) Petitioner also contends that there are unexhausted claims,

including the thirteen claims withdrawn from his amended habeas petition (*see* Dkt. 43), as well as potential new claims that are not presently before this Court, for which his ability to assist habeas counsel is required. (Dkt. 184 at 8-9, 15-16.)

Claim 9

Petitioner alleges that his Sixth and Fourteenth Amendment rights were violated because the trial judge, who was openly hostile toward Petitioner, refused to recuse himself. (Dkt. 28 at 62-64.)

Background

Petitioner's first trial ended in a hung jury. Before his second trial, Petitioner, acting pro se, moved to disqualify the trial judge, Judge Joseph Howe, arguing that he was biased and prejudiced against Petitioner. (ROA 104, 105.)[3] Petitioner cited adverse rulings issued by Judge Howe, particularly the denial of expert assistance on the issue of eyewitness identification and on-the-record comments made to Petitioner by the judge. (ROA 105.) Judge Howe initially denied the motions (RT 3/25/91 at 7, 9) but thereafter vacated his ruling (ME 3/25/91). The matter

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[3] "ROA" refers to the four-volume record on appeal from trial, including minute entries ("ME"), prepared for Petitioner's direct appeal to the Arizona Supreme Court (Case No. CR-92-0154-AP). "RT" refers to the court reporter's transcript. The original trial transcripts, a certified copy of the record on appeal, and a set of appellate briefs were provided to this Court by the Arizona Supreme Court. (Dkt. 23.)

was then assigned to Judge Rufus Coulter, who held a hearing at which Petitioner explained his position:

> [Judge Howe] is prejudicing me in a lot of motions that I bring forward. He just keeps denying all my motions. And I just feel there is going to be a big effect in this next trial because he was present, and he made a lot of decisions in my last trial. And there was a lot of prejudicial remarks that he has stated to me in court on previous hearings on my motions, and he just – he just keeps determining to just take me to trial in front of him. He has stated this to me, that he will not let me go to no other judge, just in front of him And I've made many attempts to get a change of judge, but he just calls me a fool. He don't want to listen to me, whatever I have to present to him. He says I'm just a stubborn brat. And I'm just being prejudiced. There ain't no way I'm going to get a fair trial with Judge Howe anymore.

(RT 5/15/91 at 3.) The prosecutor acknowledged that "there is some type of attitude problem between Judge Howe and the defendant. I'm not sure why it started, how it started or what effect it has had on this trial. Every time we appear in court, they snap and snarl at each other. And I have no position, nor do I have any indication as to whether or not that behavior will deprive the defendant of a fair trial." (*Id.* at 4.) Judge Coulter denied the motion, explaining, "I snap and snarl at a lot of attorneys, but I simply don't – it doesn't mean it's prejudice. Based on what has been presented, it will be ordered denying the

disqualification of Judge Howe." (*Id.*)

After his conviction in the second trial, and prior to sentencing, Petitioner filed another pro se motion seeking to disqualify Judge Howe. (ROA 150.) Petitioner again cited adverse rulings and the judge's disparaging courtroom comments; in addition to these criticisms, Petitioner noted that he had now filed a complaint against Judge Howe with the Judicial Conduct Commission. (ROA 150.) Judge Ronald Reinstein denied the motion, finding that the previous allegations of bias had been ruled on and that the filing of a complaint against a judge is not a basis for removal. (ME 10/1/91.)

On direct appeal, Petitioner's appellate counsel raised the issue of judicial bias, alleging that "[t]hroughout the proceedings in this matter, he trial judge's impartiality [sic] and bias were apparent" and citing a number of testy courtroom exchanges between Judge Howe and Petitioner. (Opening Br. at 56.) The Arizona Supreme Court rejected Petitioner's claim, finding that the reported exchanges between Petitioner and Judge Howe did not indicate bias:

> Gonzales points to several exchanges that he claims demonstrate the judge's animosity toward him, and argues that he was denied a fair trial and sentencing. But Gonzales was a difficult litigant, and while the judge understandably became impatient with him, particularly while he was acting *pro per*, none of the exchanges would support Gonzales's claim of bias. Nor did any of the exchanges take place in

> front of the jury. Other than pointing to the motions the judge denied and the sentence he imposed, Gonzales has not shown how he was prejudiced. *See Liteky v. United States*, 510 U.S. 540, ----, 114 S.Ct. 1147, 1157, 127 L.Ed.2d 474 (1994) ("*Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women . . . sometimes display.") We find that Judge Coulter properly denied Gonzales's motion for disqualification of Judge Howe.

State v. Gonzales, 181 Ariz. 502, 511-12, 892 P.2d 838, 847-48 (1995).

Analysis

In support of his contention that Claim 9 is subject to *Rohan* because it could benefit from his ability to communicate rationally with counsel, Petitioner asserts that his "substantive judicial bias claim depends on facts [outside] the record, to wit, the interaction between Petitioner and the trial court and Petitioner's observations of the trial court's interactions with others." [Dkt. 184 at 11.) The Court disagrees.

Under the AEDPA,[4] Petitioner is entitled to habeas relief on Claim 9 only if the Arizona Supreme Court's rejection of the claim constituted an

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[4] The Antiterrorism and Effective Death Penalty Act of 1996.

unreasonable application of clearly established federal law, or if it was "based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d); *see Williams v. Taylor*, 529 U.S. 362, 407 (2000).

The record regarding this claim is complete. It includes all of the comments made by Judge Howe that Petitioner contended, in his trial motions for disqualification and on direct appeal, were indicative of judicial bias. Nevertheless, habeas counsel contend that Petitioner is entitled to further development of this claim, for which Petitioner's input is required. The Court disagrees. The state court record, which details the litigation of the judicial bias claim, contains no suggestion that additional incidents occurred in which Petitioner made personal observations of the judge's behavior; Petitioner's recusal motions cited only judicial rulings and on-the-record comments that are present in the trial transcript.[5]

In an attempt to demonstrate that he was

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[5] As the Arizona Supreme Court noted, the record also reveals that Petitioner was a contentious, even manipulative, litigant. It further shows, despite the verbal jousting between Petitioner and the court, that Judge Howe demonstrated impartiality and concern for the fairness of the trial, both in his rulings, including his decision that Petitioner's confession was inadmissible (RT 1/16/91 at 83), and in many of his comments to Petitioner reiterating the perils of proceeding without counsel. At the conclusion of a three-day hearing on Petitioner's pro se motion for a new trial, Judge Howe praised Petitioner for his thoroughly-researched and well-organized presentation. (RT 12/17/91 at 128.)

diligent in developing the factual basis of this claim in state court (and thus is entitled to a federal evidentiary hearing on the claim), Petitioner directs the Court's attention to a supplemental petition filed during state post-conviction ("PCR") proceedings. (ROA-PCR 500.) In this document, Petitioner now contends, PCR counsel "alleged that there were additional facts not of record that required development with respect to a claim of judicial bias, and he requested an evidentiary hearing." (Dkt. 184 at 10.)

This contention is not well taken. First, the claim raised in the supplemental PCR petition alleged that Arizona law failed to provide Petitioner the means of proving a claim of judicial bias through voir dire of the judge (ROA-PCR 500 at 2-5), an allegation he re-urges in habeas Claim 41 (Dkt. 28 at 129-30). Second, in supporting the claim in state court Petitioner did not, as he now asserts, "allege[] that there were additional facts not of record that required development with respect to a claim of judicial bias." (Dkt. 184 at 10.) Instead, Petitioner cited, as he did in all his previous judicial bias motions, on-the-record comments indicating antagonism between Petitioner and the judge, as well as the fact that Judge Howe presided over the first trial and might therefore have been biased against Petitioner on retrial. (ROA-PCR 500 at 4.) To the extent that Petitioner alleged the existence of additional supporting evidence, it was not information gleaned from his alleged private observations of or interactions with the judge, but rather Judge Howe's feelings toward Petitioner; that is why the claim alleged a violation of Petitioner's rights based upon the lack of an opportunity to voir dire

Judge Howe.[6] Under these circumstances, Petitioner was not diligent in developing this claim in state court. *See Alley v. Bell*, 307 F.3d 380, 390-91 (6th Cir. 2002) (lack of diligence because petitioner knew of and raised claims of judicial bias in state court, but failed to investigate all the factual grounds for such claims).

Petitioner's consistent failure to allege the existence of additional facts in support of his judicial bias claim, despite adequate opportunities to do so, convinces the Court that the record is fully developed and that additional, relevant facts do not exist that are within Petitioner's private knowledge. In any event, due to the lack of diligence in state court, Petitioner is not entitled to further development of the factual basis of this claim. 28 U.S.C. § 2254(e)(2); *Williams v. Taylor*, 529 U.S. 420, 437 (2000).

The Court therefore concludes that this claim cannot potentially benefit from Petitioner's ability to communicate rationally and is not subject to the holding in *Rohan*. Habeas counsel are in a position to argues the merits of this claim without further input from Petitioner.

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[6] The claim was denied, without an evidentiary hearing, on the grounds that "Arizona law does provide such an effective means, which was used by this defendant, including the opportunity, not used, of 'voir dire' of the judge in front of another judge who holds, and in this case held, a hearing on the claim." (ME 4/21/98 at 10.)

Claims 13 and 17

Claim 13 alleges that Petitioner's rights under the Sixth and Fourteenth Amendments were violated by Deborah Wagner's presence in the courtroom during jury selection and after her testimony.[7] (Dkt. 28 at 70-71.) Claim 17 alleges that his rights were violated by the admission of Ms. Wagner's in-court identification of Petitioner, which Petitioner claims was tainted by her exposure to him during the first trial. (*Id.* at 76-78.) In support of his argument that further input from Petitioner is necessary regarding these claims, Petitioner indicates only that "[i]f evidence is taken at an evidentiary hearing on Mrs. Wagner's courtroom behavior, Petitioner's presence and competence will be required because he was an eyewitness to her presence in the courtroom and to her reactions toward him and her interactions with others there. Petitioner must be competent to perform that role." (Dkt. 184 at 13.)

Claim 13

At Petitioner's second trial, Ms. Wagner was present for voir dire, seated in the back of the courtroom. (*See* 5/28/91 at 8.) Subsequently, after the jury had been selected, defense counsel asked the court to inquire of the jurors whether they had been tainted by their exposure to Ms. Wagner's presence. (*Id.*) the court declined, explaining that asking such questions would "do more damage" than good and finding that

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[7] Ms. Wagner was present when her husband was stabbed to death. She was seriously injured while struggling with the assailant in the courtyard of the couple's townhouse.

there was no evidence of misconduct and that Ms. Wagner had a right under the Arizona Constitution to be present. (*Id.* at 8, 11.) The prosecutor indicated that, with respect to the remainder of the proceedings, Ms. Wagner, who had relocated to Colorado, intended to be present only for the opening statements and her own testimony – and that she would be the State's first witness. (*Id.* at 10.) Over the prosecutor's objection, however, the court did bar Ms. Wagner from the courtroom during opening statements but ruled that she could be present after her testimony. (*Id.* at 13.)

Petitioner raised this claim on direct appeal. (Opening Br. at 54.) The claim was based upon the assumption that Ms. Wagner was present in the courtroom after her testimony – an assumption that, Petitioner conceded, was supported by nothing in the record. (*Id.* at n.19.) The Arizona Supreme Court rejected the claim:

> Gonzales argues that Deborah [Wagner's] presence in the courtroom during jury selection and her possible presence during trial after she testified prejudiced him and denied him the right to a fair trial. This argument is without merit. Deborah had a constitutional right to attend all criminal proceedings that Gonzales had the right to attend. Ariz. Const. art. 2, § 2.1(A)(3); Rule 9.3(a), Ariz.R.Crim.P. Deborah, on her own initiative, attended jury selection. She sat in the back row of the courtroom, and neither the court nor counsel knew she was there until several days later. Nor is there any evidence that prospective jurors noticed

> Deborah or knew who she was during jury selection. Gonzales has not shown that Deborah's presence during jury selection was prejudicial. There is no evidence that Deborah intended to or did remain in the courtroom after she testified, and therefore we consider the matter no further. *State v. Ethington*, 121 Ariz. 572, 574, 592 P.2d 768, 770 (1979).

Gonzales, 181 Ariz. at 512, 892 P.2d at 848.

Petitioner is entitled to relief on Claim 13 only if the Arizona Supreme Court's rejection of the claim was contrary to or based on an unreasonable application of clearly established federal law or was based upon an unreasonable determination of the facts in light of the evidence presented in state court. 28 U.S.C. § 2254(d). It is not apparent what information Petitioner could potentially provide that would be relevant to this determination. His personal input is not necessary to determine whether Ms. Wagner in fact continued to attend the second trial after giving her testimony, or to describe her conduct during voir dire. The record indicates, for example, that at the time of the defense request to question the jury, neither the court nor the parties, all of whom were aware of Ms. Wagner's presence during voir dire, suggested that her behavior was inappropriate.

Claim 17

At Petitioner's first trial, Ms. Wagner testified

on direct examination that she thought her attacker was in the courtroom and pointed out Petitioner.[8] (RT 1/21/91 at 61.) On cross-examination, however, she suggested that her identification of Petitioner had become more certain, explaining, "I didn't get any kind of feelings until I come into this courtroom yesterday and looked at the man you're trying to defend." (RT 1/22/91 at 23.) On redirect examination, Ms. Wagner did not hesitate when asked how certain she was that Petitioner was the attacker: "That man is the man that was in our house and killed us (sic)." (*Id.* at 28.) The first trial ended in a hung jury. Prior to the second trial, defense counsel moved to dismiss the charges, citing the change in the strength of Ms. Wagner's identification of Petitioner during the first trial and his concern that she was "obviously going to identify [Petitioner] as the perpetrator" at the next trial. (RT 3/25/91 at 3-4.) The court denied the motion. (*Id.* at 8.) During her testimony at Petitioner's retrial, Ms. Wagner positively identified Petitioner. (RT 5/28/91 at 59.)

Petitioner raised the allegations contained in Claim 17 on direct appeal, citing *Neil v. Biggers*, 409 U.S. 188 (1972), and *Manson v. Braithwaite*, 432 U.S. 98 (1977).[9] (Opening Br. at 25-26.) The Arizona

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[8] Prior to trial, the court held a so-called *Desserault* hearing and determined that Ms. Wagner's exposure to a newspaper photograph was insufficient to taint her in-court identification of Petitioner. (RT 1/15/91 at 22-27.)

[9] *Biggers* and *Brathwaite* establish the framework for evaluating whether an in-court identification has been irreparably tainted by a pretrial encounter between a witness and an accused. A court must determine whether the challenged pretrial (Continued)

Supreme Court held that the claim was waived because Petitioner did not object prior to trial and finding, in the alternative, that the fact that Petitioner sat at the defense table during the prior trial was not "unduly suggestive." *Gonzales*, 181 Ariz. at 510, 892 P.2d at 846.

This is a record-based claim centering on the reasonableness of the Arizona Supreme Court's decision. Petitioner does not explain how his proposed input – i.e., his personal observations of Ms. Wagner's courtroom behavior – is relevant to this Court's assessment of the Arizona Supreme Court's application of the principles announced in *Biggers* and *Brathwaite*.

Petitioner now speculates, however, that a *Brady* violation occurred, with the withheld information explaining why Ms. Wagner was able to positively identify Petitioner at the second trial.[10] (Dkt. 184 at 12-13.) This contention is meritless. First, as already noted, Ms. Wagner ultimately made a positive courtroom identification of Petitioner during the first trial (RT 1/22/91 at 28), so any contention that her testimony changed from the first trial to the second is factually inaccurate. Next, Claim 17, as properly

(Continued).

encounter was suggestive and then examine the totality of the circumstances, including several specific factors, to determine whether the witness's in-court identification is nonetheless reliable. *Brathwaite*, 432 U.S. at 114 (citing *Biggers*, 409 U.S. at 199-200).

[10] Under *Brady v. Maryland*, a defendant's due process rights are violated if the prosecution fails to disclose evidence that is "material either to guilt or to punishment." 373 U.S. 83, 87 (1963).

exhausted, alleges only that Ms. Wagner's identification of Petitioner was tainted and unreliable "[b]ecause of the suggestive position of [Petitioner] during the first trial, seated next to defense counsel" (Dkt. 28 at 77); it does not assert that the real explanation for Ms. Wagner's courtroom identification of Petitioner in the second trial is contained in material withheld by the State in violation of *Brady*. There is no *Brady* claim before the Court. Finally, even if, contrary to the legal and factual bases upon which Claim 17 relies, the Court were to agree that the claim somehow incorporates an allegation of a *Brady* violation, there is no indication that Petitioner's participation is required to identify or locate exculpatory material related to this issue. Therefore, the claim would not potentially benefit from Petitioner's competence.

Claims 29, 30, and 34

Claims 29 and 30 challenge the sufficiency of the evidence supporting the two aggravating factors – grave risk of harm to others and pecuniary gain – found by the trial court and affirmed by the Arizona Supreme Court.[11] (Dkt. 28 at 100-03.) These are clearly record-based claims. Further evidence, including personal input from Petitioner, is not necessary because there is nothing that can be added to the facts upon which the state courts' findings were

---

[11] The claims also assert that Petitioner's constitutional rights were violated because the factors were found by the court rather than a jury. (*See* Dkt. 28 at 101-03.) That challenge is foreclosed by *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004).

based. *See Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) (articulating standard for habeas review of state court's application of aggravating factor – i.e., whether any rational factfinder could have determined that the factor was proved); *Jackson v. Virginia*, 443 U.S. 319, 322 (1979) (this type of claim almost never necessitates an evidentiary hearing); *Bashor v. Risley*, 730 F.2d 1228, 1233 (9th Cir. 1984) ("Whether the evidence was sufficient . . . must be determined from a review of the evidence in the record in the *state* proceedings. No evidentiary hearing was required.")

Claim 34, which asserts that Arizona's statutory death penalty scheme unconstitutionally precludes the sentencer from considering all mitigating evidence, consists of an exclusively legal issue, for which input from a layperson is not potentially beneficial. (*Id.* at 108-09.)

Unexhausted claims and claims not yet raised

Petitioner contends that the Court, in considering whether to stay the case based on Petitioner's incompetence under *Rohan*, should take into account Petitioner's capacity to assist counsel with the thirteen unexhausted claims withdrawn from his amended petition as well as potential and unnamed new claims. The Court disagrees.

Background

After Petitioner voluntarily withdrew the unexhausted claims from his habeas petition, he returned to state court and initiated successive PCR

proceedings. The state court appointed counsel to represent Petitioner; however, before a petition was filed, Petitioner, acting pro se, requested that his second state PCR proceeding be withdrawn and his counsel dismissed so that he could proceed pro se in federal court. The state court ordered a mental health examination to determine whether Petitioner was competent to waive counsel. (*See* Dkt. 102, Ex. 3.) The court-appointed expert, Dr. Jack Potts, examined Petitioner and concluded that he was paranoid and delusional and incompetent to waive counsel. (*Id.*, Ex. 4 at 3.) Dr. Potts also reported that Petitioner refused to cooperate with him; had Petitioner cooperated, Dr. Potts's "opinion would quite possibly have been different." (*Id.*) Based on Dr. Potts's conclusions, the court found Petitioner incompetent to waive counsel and represent himself. (*Id.*, Ex. 9.)

On the day Petitioner's successive PCR petition was due, counsel filed a motion to hold the case in abeyance until Petitioner became competent to assist counsel in the successive PCR proceeding. (Dkt. 102, Ex. 11.) The court denied the motion, finding that there was no right to a competency determination, that the claim of legal incompetency at the time of trial and sentencing was not "cognizable in a second PCR proceeding in this particular case" under Rules 32.1(e) and (h) and 32.2(b) of the Arizona Rules of Criminal Procedure, and that even if the claim was cognizable, counsel had not set forth "sufficient reasons for not raising the claim in a previous petition or in a timely manner or demonstrated why defendant's competency is essential to filing the prospective second Rule 32 proceeding." (*Id.*, Ex. 12.)

Despite this ruling, in February 2002 counsel for Petitioner filed a successive PCR petition asserting four claims, including claims that Petitioner had a right to assist counsel in a second PCR proceeding, that he was entitled to an evidentiary hearing to determine his current competency, and that he was incompetent at the time of trial and sentencing. (Dkt. 108, Ex. 1.) Counsel did not raise any of the claims withdrawn from the amended habeas petition. (*Id.*) The state court again denied the petition, explaining, with respect to the third claim, that Petitioner had failed to present a "colorable claim . . . that newly discovered evidence shows defendant was incompetent to stand trial." (Id., Ex. 3.) Counsel filed a petition for review, which the Arizona Supreme Court denied. (*Id.*, Ex. 6.)

Analysis

As an initial matter, it is clear that a number of the thirteen withdrawn claims are record-based and resolvable as a matter of law, while others, like Claims 37, 56, and 58, are plainly meritless or non-cognizable. All of the claims, including those to which a *Rohan* analysis may be applicable – e.g., Claim 52, alleging ineffective assistance of counsel at sentencing – remain unexhausted because they have never presented to the state court.

Petitioner argues, pursuant to 28 U.S.C. § 2254(b)(1)(B), that Arizona's "corrective process proved to be futile because of Petitioner's incompetence in that forum and the state court's failure to stay the

proceedings until Petitioner was restored," and that his "incompetence should serve to forgive the failure to exhaust in state court and permit Petitioner to supplement the amended petition with the withdrawn claims."[12] (Dkts. 184 at 4, 186 at 15.) The Court disagrees.

Petitioner was not prevented from raising in state court the thirteen claims withdrawn from his habeas petition. He noticed the claims but then failed to raise them in his second PCR petition, which instead set forth a different set of claims. Thus, counsel could have pursued and exhausted the withdrawn claims during Petitioner's successive PCR proceedings. At this point, in addition to being unexhausted, the claims are no longer before this Court. Consequently, Petitioner's competency to assist counsel with the claims is irrelevant.

Finally, counsel for Petitioner speculate that unknown evidence exists that might "support[] a colorable claim of actual innocence."[13] (Dkt. 184 at 16.)

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[12] The Court notes that Petitioner has not moved to amend his habeas petition to include the withdrawn claims or the new claims raised in his successive PCR proceedings.

[13] Petitioner has not raised an actual innocence claim. Given the facts of the case, which include Petitioner's suppressed confession, eyewitness accounts of the attack and of his presence near the Wagner home, and circumstantial evidence of guilt, including physical evidence linking him to the crime scene and reports that, in the immediate aftermath of the attack, Petitioner returned home with various injuries and in possession of a purse matching Ms. Wagner's, the potential for successfully bringing
(Continued)

In support of this assertion, they argue that *Rohan* stands for the proposition that habeas proceedings must be stayed whenever a petitioner is incompetent, because a competent petitioner might have information in support of a claim of actual innocence. (*Id.*) The Court rejects this reading, which is inconsistent with the holdings of both *Rohan*, 334 F.3d at 819, and *Holmes v. Buss*, 506 F.3d at 579-80, each of which conditions the right to competence on the presence of claims that can benefit from the petitioner's ability to communicate rationally. This analytical framework would be a nullity under the interpretation advanced by Petitioner's counsel because any habeas petitioner found to be incompetent would be entitled to a stay, no matter the nature of his claims, simply by asserting that additional, hypothetical information exists that the petitioner is presently unable to share with counsel.

CONCLUSION

Claims 9, 13, 17, 29, 30, and 34 are distinguishable from the claims discussed in *Rohan* in that their presentation in these habeas proceedings cannot benefit from Petitioner's personal input. Petitioner's properly-exhausted claims are record-based and/or resolvable as a matter of law, irrespective

(Continued).

such a claim is minimal. Similarly, taking into account the volume of the record, the nearly decade-long period between the trial and Petitioner's claims of incompetence, and the thoroughness of the amended petition, the Court views with skepticism the possible existence of undiscovered constitutional violations.

of Petitioner's capacity for rational communication with counsel.

In addition, as Respondents note, this case is different from *Rohan* in that Petitioner's claim of incompetence arose several years after he had filed his amended petition, which set forth the factual bases for all of his claims; it is also, unlike *Rohan*, a post-AEDPA case, so that Petitioner's claims are subject to a "substantially higher threshold for habeas relief." *Schriro v. Landrigan*, 127 S. Ct. 1933, 1939-40 (2007). While these factors are not dispositive, *see Hill v. Ayers*, 2008 WL 683422, the Court believes that they support its decision not to stay these proceedings.

Finally, while the Court has found it unnecessary to determine whether Petitioner is unable, as opposed to unwilling, to communicate rationally with counsel, the Court notes that its review of the record, including the reports from Petitioner's recent stay at ASH, shows that Petitioner possesses at least a limited capacity for rational communication.[14] Further, the likelihood exists that this capacity can be maximized through the use of anti-psychotic medication. Petitioner at one point availed himself of the opportunity to enhance his capacity for rational thought and communication through the use of such

---

[14] While Petitioner refused to meet with counsel in order to facilitate the progress of these proceedings, he did agree to meet with mental health experts in support of his motion to determine competency and stay the proceedings. As discussed above, Petitioner was at times able to communicate rationally with Drs. Scherzer and Seward.

medication. He may choose to do so again. A contrary decision will not, however, for the reasons set forth above, forestall these proceedings.

Based on the foregoing,

IT IS HEREBY ORDERED that Petitioner's Motion for Competency Determination and to Stay Proceedings (Dkt. 102) is **DENIED**.

IT IS FURTHER ORDERED that Petitioner shall file his Merits Memorandum (*see* Dkt. 97) no later than June 20, 2008.

IT IS FURTHER ORDERED that if, pursuant to LRCiv 7.2(g), Petitioner or Respondents file a Motion for Reconsideration of this Order, such motion shall be filed within **fifteen (15) days** of the filing of this Order. The filing and disposition of such motion does not toll the time for the filing of the Merits Memorandum.

DATED this 23rd day of April, 2008.

/s/_____

Stephen M. McNamee
United States District Judge

APPENDIX D

Molly C. Dwyer
Clerk of Court
415-355-8000

Office of the Clerk
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
95 Seventh Street
Post Office Box 193939
San Francisco, California 94119-3939

May 23, 2008

No. 08-72188 Ernest Gonzales v. USDC-AZP

A petition for writ of mandamus and/or prohibition has been received in the Clerk's Office of the United States Court of Appeals for the Ninth Circuit. The U.S. Court of Appeals docket number shown above has been assigned to this case. Always indicate this docket number when corresponding with this office about your case.

If the U.S. Court of Appeals docket fee has not yet been paid, please make immediate arrangements to do so. If you wish to apply for in forma pauperis status, you must file a motion for permission to proceed in forma pauperis with this court.

Pursuant to Rule 21(b), FRAP, no answer to a petition for writ of mandamus and/or prohibition may be filed unless ordered by the Court. If such an order is issued, the answer shall be filed by the respondents within the time fixed by the Court.

A copy of the docket sheet case title page is attached. Please take special note of the case caption, as it may differ from that shown on the paper submitted for filing. Pursuant to Circuit Rule 21-2, an application for writ of mandamus and/or prohibition shall not bear the name of the district court judge concerned. Rather, the appropriate district court shall be named as respondent.

Very truly yours,

Molly C. Dwyer
Clerk of Court

APPENDIX E

FILED
JUN 19 2008
Molly C. Dwyer, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERNEST VALENCIA GONZALES, *Petitioner,*	)	No. 08-72188
v.	)	D.C. No.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, *Respondent,*	)	CV-99-02016-SMM D. Aiz.
DORA B. SCHRIRO, *Real-party-in-interest.*	)	ORDER

Before: REINHARDT, BERZON, and M. SMITH, Circuit Judges

The State's expert has agreed that Petitioner, unmedicated, is incompetent. In light of the serious legal issue raised and the hardships tipping sharply in Petitioner's favor, we grant a temporary stay of the district court's proceedings pending resolution of Petitioner's emergency motion for stay of the district court's proceedings and an emergency petition for writ

of mandamus, filed on May 23, 2008.

By July 18, 2008, Petitioner shall file a supplemental brief, not to exceed 8400 words, addressing, *inter alia*, (a) whether this Court has collateral order jurisdiction to review the district court's April 23, 2008 order and, if so, (b) whether the district court erred in denying a competency hearing and denying a stay. Real Party in Interest shall, and the district court may, file a supplemental response of no more than 8400 words by August 18, 2008. Petitioner's supplemental reply, not to exceed 4200 words, is due August 29, 2008.

John Pressley Todd, Esq.
ARIZONA ATTORNEY GENERAL'S OFFICE
1275 W. Washington Street
Phoenix, AZ. 85007

APPENDIX F

FILED
JUl 17 2008
Molly C. Dwyer, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERNEST VALENCIA GONZALES, *Petitioner,*	)	No. 08-72188
v.	)	D.C. No. 2:99-cv-02016-SMM
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, *Respondent,*	)	D.Ariz.
DORA B. SCHRIRO, *Real-party-in-interest.*	)	ORDER

Before: REINHARDT, BERZON, and M. SMITH, Circuit Judges

Today, we file contemporaneously with this order, an "Amended Order," amending our June 19, 2008 order to add citations to two cases; to state that it was Dr. Seward, he supervising psychologist at the Arizona State Hospital where Petitioner was transferred at the State's request for an extended mental health

assessment, who found that Petitioner, unmedicated, is incompetent; and to extend the supplemental briefing due dates by the number of days the State's motion for reconsideration was pending. With these changes to our June 19, 2008 order, we deny the State's motion for reconsideration of our order granting a temporary stay of district court proceedings.

APPENDIX G

FILED
JUl 17 2008
Molly C. Dwyer, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERNEST VALENCIA GONZALES, *Petitioner,*	)	No. 08-72188
v.	)	D.C. No. 2:99-cv-02016-SMM
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, *Respondent,*	)	D.Ariz.
DORA B. SCHRIRO, *Real-party-in-interest.*	)	AMENDED ORDER

Before: REINHARDT, BERZON, and M. SMITH, Circuit Judges

We replace our June 19, 2008 order with this amended order:

Dr. Seward, the supervising psychologist at the Arizona State Hospital where Petitioner was transferred at the State's request for an extended

mental health assessment, found that Petitioner, unmedicated, is incompetent.

In light of the serious legal issues raised and the hardships tipping sharply in Petitioner's favor, we grant a temporary stay of the district court's proceedings pending resolution of Petitioner's emergency motion for stay of the district court's proceedings and an emergency petition for writ of mandamus, filed on May 23, 2008. *See Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983) (the standard for granting a stay is a continuum; at one end of the continuum, a stay is warranted if the moving party demonstrates that serious legal questions are raised and the balance of hardships tips sharply in its favor); *see also Golden Gate Restaurant Association v. City and County of San Francisco*, 512 F.3d 1112, 1115-16 (9th Cir. 2008).

By August 1, 2008, Petitioner shall file a supplemental brief, not to exceed 8400 words, addressing, inter alia, (a) whether this Court has collateral order jurisdiction to review the district court's April 23, 2008 order and, if so, (b) whether the district court erred in denying a competency hearing and denying a stay. Real Party in Interest shall, and the district court may, file a supplemental response of no more than 8400 words by September 5, 2008. Petitioner's supplemental reply, not to exceed 4200 words, is due September 16, 2008.

APPENDIX H

FILED
JAN 5 2009
Molly C. Dwyer, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ERNEST VALENCIA GONZALES, Petitioner,	)	No. 08-72188
v.	)	D.C. No. 2:99-cv-02016-SMM D.Ariz.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, Respondent,	)	SECOND AMENDED ORDER
DORA B. SCHRIRO, Real party in interest.	)	

Before: REINHARDT, BERZON, and M. SMITH, Circuit Judges

The district court's independent medical expert found that Petitioner, unmedicated, is incompetent. In light of the serious legal issues raised and the hardships tipping sharply in Petitioner's favor, we grant a temporary stay of the district court's proceedings pending resolution of Petitioner's

emergency motion for stay of the district court's proceedings and an emergency petition for writ of mandamus, filed on May 23, 2008. *See Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983) (the standard for granting a stay is a continuum; at one end of the continuum, a stay is warranted if the moving party demonstrates that serious legal questions are raised and the balance of hardships tip sharply in its favor); *see also Golden Gate Restaurant Association v. City and County of San Francisco*, 512 F.3d 1112, 1115-16 (9th Cir. 2008).

Because *Nash v. Schriro*, No. 06-99007, and *Adams v. Schriro*, No. 07-99018, involve related issues that are likely to affect our decision in the present case, the proceeding in the Court of Appeals are stayed pending resolution of *Nash* and *Adams*.

APPENDIX I

Court of Appeals Docket #: 08-72188 Ernest Gonzales v. USDC-AZP **Appeal From:** U.S. District Court for Arizona, Phoenix **Fee Status:** IFP Pending In COA	**Docketed:** 05/23/2008 **Termed:** 10/20/2010

Case Type Information:
1) original proceeding
2) mandamus/prohibition
3) null

05/23/2008	1 2 pg, 129.96 KB	FILED EMERGENCY PETITION FOR WRIT OF MANDAMUS AND APPENDIX 1-24. DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. NOTIFIED REAL PARTIES IN INTEREST OF FILING.--[Edited 05/23/2008 by BY] (BY)
05/23/2008	2	Filed Petitioner Ernest Valencia Gonzales emergency motion for stay of District Court proceedings pending determination of emergency petition for writ of mandamus asserting incompetent Capital Petitioner cannot proceed in Habeas Under Rohan ex rel. Gates v. Woodford; served on 05/22/2008. (BY)
05/23/2008	3	Filed Petitioner Ernest Valencia Gonzales motion to proceed In Forma Pauperis. Served on

			05/22/2008. (BY)
06/11/2008	⌐	4	Received Petitioner Ernest Valencia Gonzales supplement to emergency petition for writ of mandamus and emergency motion for stay of district court proceedings pending determination of emergency petition for writ of mandamus and notice of distrcit court's denial of permission to appeal. Served on 06/10/2008 (MT)
06/12/2008	⌐	5	Filed Real Party in Interest Dora B. Schriro 's response opposing Emergency Motion to stay lower court action. Served on 06/12/2008. (PA)
06/16/2008	⌐	6	Filed Petitioner Ernest Valencia Gonzales's (Electronic and Fax) Reply to Respondent's Response to Emergency Petition for Writ of Mandamus; served on 06/16/2008. (DP-Staff/Atty) (PA)
06/19/2008	⌐	7 2 pg. 29.11 KB	Filed order (STEPHEN R. REINHARDT, MARSHA S. BERZON and MILAN D. SMITH, JR.) The State's expert has agreed that Petitoner, unmedicated, is incompetent. in light of the serious legal issues raised and the hardships tipping sharply in Petitioner's favor, we grant a temporary stay of the district court's proceedings pending resolution of Petitioner's emergency motion for stay of the district court's proceedings and an

			emergency petition for writ of mandamus, filed on 5/23/08..... (See ORDER)[Faxed/Served/Phoned Csl] (PA)
07/03/2008	⌐	8	Deleted Incorrect Docket Entry. (MT)
07/03/2008	⌐	9	ENTRY UPDATED. Filed Respondent USDC-AZP motion for reconsideration. (DP-Staff/Atty). Served on 07/02/2008.--[Edited 07/14/2008 by HH]: ENTRY UPDATED to reflect the respondent is Dora B. Schriro. (MT)
07/17/2008	⌐	10 1 pg, 24 KB	Filed order (STEPHEN R. REINHARDT, MARSHA S. BERZON and MILAN D. SMITH, JR.)Today, we file contemporaneously with this order, an "Amended Order," amending our June 19, 2008 order to add citations to two cases; to state that it was Dr. Seward, the supervising psychologist at the Arizona State Hospital where Petitioner was transferred at the State's request for an extended mental health assessment, who found that Petitioner, unmedicated, is incompetent; and to extend the supplemental briefing due dates by the number of days the State's motion for reconsideration was pending. With these changes to our June 19, 2008 order, we deny the State's motion for reconsideration of our order

		granting a temporary stay of district court proceedings. (Phoned/Faxed/Served Csl) (PA)
07/17/2008	11 2 pg, 35.33 KB	Filed AMENDED order (STEPHEN R. REINHARDT, MARSHA S. BERZON and MILAN D. SMITH) We replace our June 19, 2008 order with this amended order: Dr. Seward, the supervising psychologist at the Arizona State Hospital where Petitioner was transferred at the State's request for an extended mental health assessment, found that Petitioner, unmedicated, is incompetent. In light of the serious legal issues raised and the hardships tipping sharply in Petitioner's favor, we grant a temporary stay of the district court's proceedings pending resolution of Petitioner's emergency motion for stay of the district court's proceedings and an emergency petition for writ of mandamus, filed on May 23, 2008. See Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983) (the standard for granting a stay is a continuum; at one end of the continuum, a stay is warranted if the moving party demonstrates that serious legal questions are raised and the balance of hardships tips sharply in its favor); see also Golden Gate Restaurant Association v. City and County of San Francisco, 512 F.3d 1112, 1115-16 (9th Cir. 2008). By August 1, 2008, Petitioner shall file a

		supplemental brief, not to exceed 8400 words, addressing, inter alia, (a) whether this Court has collateral order jurisdiction to review the district court's April 23, 2008 order and, if so, (b) whether the district court erred in denying a competency hearing and denying a stay. Real Party in Interest shall, and the district court may, file a supplemental response of no more than 8400 words by September 5, 2008. Petitioner's supplemental reply, not to exceed 4200 words, is due September 16, 2008. (phone/faxe/served csl) (PA)
07/18/2008	12	Received Petitioner Ernest Valencia Gonzales supplemental brief with appendix. Served on 07/17/2008. (Per Petitioner's Csl on 7/18/08, DOCUMENT IS DISREGARDED [see 7/17/08 Amended Order]) (PA)
08/01/2008	13	Filed original and 4 copies of Petitioner Ernest Valencia Gonzales's supplmental brief of 36 pages or 8,389 words with attached exhibits. Served on 7/31/08. (DP-Staff/Atty) (PA)
08/28/2008	15	Filed original and copies of Respondent USDC-AZP supplmental response brief of 10 pages pursuant to Court's Order filed on 7/17/08. Served electronically on 08/28/2008. (Orig and copies to be followed by mail.)- [9/8/08 Rcv'd Orig and additional copies of USDC's Supplemental

		Response Brief) (PA)
09/05/2008	14	Filed original and 15 copies of Respondent -RPI's supplmental brief of 30 pages or 6692 words in Opposition to Petiion for Writ of Mandamus. Served on 09/04/2008. (DP-Staff/Atty) (PA)
09/16/2008	16 123 pg. 2.7 MB	Submitted (ECF) Reply brief for review and filed Motion to file oversized brief. Submitted by Petitioner Ernest Valencia Gonzales. Date of service: 09/16/2008. [6647684] (LM)
01/05/2009	17 2 pg. 35.24 KB	Filed order (STEPHEN R. REINHARDT, MARSHA S. BERZON and MILAN D. SMITH, JR.)The district court's independent medical expert found that Petitioner, unmedicated, is incompetent. In light of the serious legal issues raised and the hardships tipping sharply in Petitioner's favor, we grant a temporary stay of the district court's proceedings pending resolution of Petitioner's emergency motion for stay of the district court's proceedings and an emergency petition for writ of mandamus, filed on May 23, 2008. See Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983) (the standard for granting a stay is a continuum; at one end of the continuum, a stay is warranted if the moving party demonstrates that serious legal questions are raised and the balance of

		hardships tip sharply in its favor); see also Golden Gate Restaurant Association v. City and County of San Francisco, 512 F.3d 1112, 1115-16 (9th Cir. 2008). Because Nash v. Schriro, No. 06-99007, and Adams v. Schriro, No. 07-99018, involve related issues that are likely to affect our decision in the present case, the proceedings in the Court of Appeals are stayed pending resolution of Nash and Adams. (PA)
04/28/2010	18 5 pg, 39.38 KB	Filed (ECF) Respondent Dora B. Schriro Correspondence: Request for a Ruling on the Pending 2008 Writ of Mandamus. Date of service: 04/28/2010 [7317441] (JPT)
05/11/2010	19 4 pg, 12.05 KB	Filed (ECF) Petitioner Ernest Valencia Gonzales response to motion 0. Date of service: 05/11/2010. [7332598] (LM)
10/20/2010	20 14 pg, 428 69 KB	FILED OPINION (STEPHEN R. REINHARDT, MARSHA S. BERZON and MILAN D. SMITH, JR.) The petition for a writ of mandamus is GRANTED. FILED AND ENTERED JUDGMENT. [7515279] (RP)

APPENDIX J

18 U.S.C.A. § 3599

(a)(1) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either--

(A) before judgment; or

(B) after the entry of a judgment imposing a sentence of death but before the execution of that judgment; shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

(2) In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

(b) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the

prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.

(c) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(d) With respect to subsections (b) and (c), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(e) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

(f) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

(g)(1) Compensation shall be paid to attorneys appointed under this subsection at a rate of not more than $125 per hour for in-court and out-of-court time. The Judicial Conference is authorized to raise the maximum for hourly payment specified in the paragraph up to the aggregate of the overall average percentages of the adjustments in the rates of pay for the General Schedule made pursuant to section 5305 of title 5 on or after such date. After the rates are raised under the preceding sentence, such hourly range may be raised at intervals of not less than one year, up to the aggregate of the overall average percentages of such adjustments made since the last raise under this paragraph.

(2) Fees and expenses paid for investigative, expert, and other reasonably necessary services authorized under subsection (f) shall not exceed $7,500 in any

case, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge, if the services were rendered in connection with the case disposed of entirely before such magistrate judge, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active or senior circuit judge.

(3) The amounts paid under this paragraph for services in any case shall be disclosed to the public, after the disposition of the petition.

OPPOSITION BRIEF

No. 10-930

IN THE

Supreme Court of the United States

CHARLES L. RYAN, Director,
Arizona Department of Corrections,

Petitioner,

v.

ERNEST VALENCIA GONZALES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

JON M. SANDS
FEDERAL PUBLIC DEFENDER
LETICIA MARQUEZ*
TIMOTHY M. GABRIELSEN
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QUESTIONS PRESENTED FOR REVIEW

Whether certiorari should be denied where the Petition for Writ of Certiorari overlooks this Court's precedent and the Common Law and only seeks error correction of an interlocutory decision, the foundation of which is Judge Kozinski's methodical *Rohan** decision, with which no circuit has disagreed.

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* *Rohan ex. rel. Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003)

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4 Sir William Blackstone, *Commentaries on the Laws of England*, 24-25, 389, 395-96 (1769) 22

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STATEMENT OF THE CASE

Introduction And Summary Of Procedural History

A. District Court Proceedings.

Respondent was convicted of first degree murder and sentenced to death in 1992. *State v. Gonzales*, 892 P.2d 838, 849 (Ariz. 1995). The Office of the Federal Public Defender has represented Respondent since November 30, 1999. Since that time, Respondent's ability to communicate rationally with counsel has incrementally declined to the point where it has become non-existent. While the case sat idle in the district court for a number of years, counsel regularly attempted communication with Respondent with little or no success.

During this time, state habeas was sought to exhaust claims for the habeas proceedings. Pet. App. B at 3. On April 19, 2001, the state post-conviction court ordered an evaluation to determine whether Respondent was competent to proceed in his state post-conviction proceedings. Pet. App. B at 3. Ultimately, the state court ruled that state law did not require a post-conviction petitioner to be competent to proceed. Pet. App. B at 3.

The district court then ordered merits briefing and evidentiary development on a number of issues the court found were properly exhausted. Pet. App. B at 4-5. At that point, based on their knowledge and understanding of Respondent's condition, habeas counsel for Respondent had no choice but to move for a determination of competency pursuant to *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003). Resp't. App. A.

Initially, the district court and Petitioner conceded that Respondent had in fact "identified *claims* where [Respondent] potentially will provide beneficial assistance during briefing of the remaining issues and cited," a claim of judicial bias.[1] Resp't. App. B at 12A, Resp't. App. C at 15A.

Shortly before a *Rohan* hearing was to be held, Respondent was ordered moved by the district court, at the urging of Petitioner, to a state mental hospital for an extensive evaluation. Pet. App. A at 3. The state doctors agreed with Respondent's counsel's expert that Respondent suffered from psychosis and was "unable to *communicate rationally* for any extended period of time, such as would be required by a legal proceeding." Pet. App. A at 3 (emphasis added). The district court then inexplicably ordered additional briefing and reversed its finding that Respondent's claims could potentially benefit from his assistance. Pet. App. C at 27-8. The district court also ordered merits briefing of Respondent's additional claims. Pet. App. C at 29.

Respondent moved the district court for a stay of the merits briefing and permission to appeal its decision, and the district court denied both. Resp't. App. D.

B. Circuit Court Proceedings.

With a merits briefing date approaching, Respondent moved the Circuit Court for an emergency stay of the

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1. Petitioner made that concession at an October 15, 2007, hearing ("... and obviously there are some [issues] that they need Mr. Gonzales to answer ..."). Resp't. App. C.

merits briefing and filed an Emergency Petition for Writ of Mandamus requesting review of the district court's order. Pet. App. at I-1. The request for a writ of mandamus arose from a series of inconsistent district court rulings that culminated in the denial of Respondent's request for a determination of competency, as set forth above. Rather than proceeding as a nominal party, the district court personally filed its own opposition to Respondent's emergency stay petition. Pet. App. H.

Citing the state hospital's assessment that Respondent is incompetent when unmedicated, the Circuit Court granted Respondent's request for a temporary stay of the merits briefing and ordered supplemental briefing. Pet. App. G. Respondent's proceedings were then stayed pending the outcome of two cases raising *Rohan* claims which were later consolidated. Pet. App. F. After the consolidated case was decided, the Circuit Court issued the decision in this matter. Pet. App. A.

SUMMARY OF THE ARGUMENT

[Note: Although the Circuit Court cited *Nash v. Ryan*, 581 F.3d 1048 (9th Cir. 2009), in its limited decision to remand Respondent for a determination of competency, the basis for its decision is Judge Alex Kozinski's unanimous opinion in *Rohan ex. rel. Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003). Because Petitioner is using this case to attack the *Rohan* decision and refers to *Rohan* and the instant case interchangeably, Respondent will address the *Rohan* decision in this Brief in Opposition. The *Nash* Opinion is inapt and nonetheless

irrelevant, as it addresses only the limited issue of competency on appeal.]

Petitioner seeks to have the Court correct what it perceives to be a legal error in an interlocutory appeal. Yet, a final judgment could obviate the need for review, as Respondent's competency has yet to be determined. As is evidenced by Petitioner's Petition for Writ of Certiorari, the true object of his rancor is the *Rohan* decision itself, a case in which this Court has already denied review. *Woodford v. Rohan*, 540 U.S. 1069 (2003).

Petitioner accuses Judge Kozinski of basing *Rohan* on "flawed policy grounds, creating a right out of thin air" that aids delay tactics, and causing disparate treatment of the financially stable habeas petitioner. Pet. at 3, 7, 18. Nothing however could be further from the truth. This case involves a straight-forward application of the prior decisions of this Court, including *Rees v. Peyton*, 384 U.S. 312 (1966) (*Rees I*), *Rees v. Peyton*, 386 U.S. 989 (1967) (*Rees II*), and *Ford v. Wainwright*, 477 U.S. 399 (1986). Petitioner presents no compelling reasons warranting this Court's review. In finding a right to be competent at habeas corpus, Judge Kozinski faithfully applied well-settled principles of habeas corpus jurisprudence and the Common Law. The unanimous *Rohan* Opinion neither conflicts with the precedent of this Court nor with the decisions of other circuits. In addition, the impact of the *Rohan* decision on capital habeas proceedings has proven to be minimal. The Petition for Writ of Certiorari should therefore be denied.

REASONS FOR DENYING THE PETITION

I. THE CASE DOES NOT MEET THIS COURT'S STANDARDS FOR REVIEW UNDER SUPREME COURT RULES 10, 11, AND 15.

A. This case is not ripe for review.

This Court should not accept jurisdiction because of the possibility that Respondent *may* be incompetent, without the district court first determining that question. The Court is being asked to decide a claim that is not yet ripe.

The Circuit Court granted Respondent's emergency petition for writ of mandamus and lifted the temporary stay it had ordered of the district court's proceedings. Pet. App. A. (*In re Gonzales*, 623 F3d. 1242 (9th Cir. 2010)). The district court must now hold a competency hearing to determine whether Respondent can meaningfully communicate with counsel. No final order has been issued in this case.

This Court very rarely grants review of a non-final order because doing so may induce inconvenience, litigation costs, and delay in determining ultimate justice. *Gillespie v. U.S. Steele Corp.*, 379 U.S. 148, 152-53 (1964). Petitioner failed to address why this Court should take the *exceptional* step of granting certiorari review of a non-final order. Certiorari is only appropriate if a case "is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11; *see also Bhd. of Locomotive Firemen and Enginemen v. Bangor &*

Aroostock R.R. Co., 389 U.S. 327, 328 (1967) (*per curiam*) (denying certiorari where petitioner sought review of an adverse court of appeals' ruling because the case had been remanded to the district court and therefore, was not ripe for review). Review is also unnecessary because this case is not far-reaching enough to be of "imperative public importance." Sup. Ct. R. 11.

Petitioner fears that if Respondent is incompetent that will result in an indefinite stay of proceedings. However, Respondent has yet to be determined incompetent. If Respondent were found competent in the district court, habeas proceedings would continue and this would negate the need for any action by this Court. Not only has Respondent *not* been determined incompetent, but the district court noted that the mental health reports offered in that court were conflicting with respect to competency. Pet. App. at C-3. Even if Respondent is found incompetent, review is further premature because he would not be entitled to a permanent, indefinite stay of proceedings. Respondent was already treated with psychotropic medication at the state hospital, with some success. This may indicate that even if found incompetent, Respondent may later regain competency, allowing the habeas proceedings to continue. Therefore, Petitioner's request for certiorari is based on speculation and hypotheticals.

In sum, the specter of an indefinite stay, argued by Petitioner, is simply too far removed from the present litigation to justify immediate intervention by this Court. Petitioner's fear of an indefinite stay will only come to fruition *if* Respondent is found incompetent; *if* the district court and the Circuit Court choose not to pursue the

appointment of a next friend; and, *if* Respondent does not regain competency. "Too many 'ifs'" must come to pass before this Court's review is appropriate. *California v. Rooney*, 483 U.S. 307, 313 (1987) (*per curiam*) (dismissing review as improvidently granted because the State argued too many "ifs" and "[e]ven if everything the prosecution fears comes to bear, the State will still have the opportunity to appeal such an order, and this Court will have the chance to review it").

The issues raised in Petitioner's request for certiorari are not, and may never be, ripe. Because no final order has issued, and because the issues Petitioner now appeals may disappear entirely once a final order *is* issued, this Court's review is premature.

B. Petitioner does not present compelling reasons for review.

Petitioner does not present any compelling reason for this Court to grant certiorari. Judge Kozinski's *Rohan* Opinion, upon which this decision is based, applied well-settled principles of habeas corpus jurisprudence and the Common Law, and did not create a conflict with decisions from other circuits or contravene the precedent of this Court, or otherwise involve a question of exceptional importance. *See* Sup. Ct. R. 10.

Thus, the case has not so far departed from "the accepted and usual course of judicial proceedings" as to call for this Court's exercise of its supervisory power. Sup. Ct. R. 10(a). In fact, the *Rohan* Opinion relied on jurisprudence extending back to the English Common Law for support on judicial practice in capital cases, and

found that the right to be competent was crucial to allow a defendant to defend himself where the punishment was the death penalty. 334 F.3d at 807-09.

Petitioner has presented no sound reason to distinguish this case from the many capital cases where state officials request error correction from this Court based solely on their disagreement with the conclusion of a lower court. This Court's burden and responsibilities are too great to review and correct every alleged misstep made by a lower court. *See* Sup. Ct. R. 10. (This Court will rarely grant review where the lower court has arguably misapplied "a properly stated rule of law"). Otherwise, the Court becomes just another court of appeals, contrary to its mission. "[This Court's] review is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review." *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974).

Finally, the Court need not accept this appeal because it fails to concern an important matter of federal law that "has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). As set forth in Argument III *infra*, there are not enough decided cases in the lower federal courts for this claim to rise to the level of broad national significance.

C. Respondent's claims are not record-based; this is merely a factual dispute.

The Circuit Court ruled that although Respondent's claims were "record-based or legal in nature, he [was] entitled to a stay pending a competency determination" under *Rohan*. Pet. App. at A-2. The court specifically found, at a minimum, that Respondent's counsel could

benefit from Respondent's "first-hand insight into the earlier proceedings," which only a competent petitioner would be able to provide. Pet. App. at A-5. The Circuit Court identified Respondent's judicial bias claim as one requiring rational communication between attorney and client because Respondent, like Nash, had been represented by many attorneys over time, including 11 at trial and sentencing, he represented himself for a portion of that time, and he was needed to explain events so counsel would understand their "significance and context." Pet. App. at A-5

Regrettably, while the Circuit Court stated that federal habeas counsel could benefit from rational communication with Respondent with respect to his claims, all of which the court described as "record-based or legal in nature," not all of Respondent's claims fall into that category. As noted in the Statement of the Case, *supra*, Respondent demonstrated to the satisfaction of the district court that his judicial bias claim was *not* solely record-based, a point conceded by Petitioner in the district court but not addressed in the Petition for Writ of Certiorari. Resp't. App. B at 12A, Resp't. App. C at 15A. Accordingly, the district court initially ordered a *Rohan* hearing to determine Respondent's competency. The district court later explained its change of mind, stating that the state court trial record "contains no suggestion that additional [unreported] incidents occurred in which petitioner made personal observations of the judge's behavior." Pet. App. C - 14. Of course, it is not only the words reported by the court reporter at trial that might reflect judicial bias, it is also actions and words of a trial court not appearing on the face of the trial court record that tend to prove a judicial bias claim. *See Bracy v. Gramley*, 520 U.S. 899 (1997).

Respondent's trial judge may have failed to comply with an ethical duty of disclosure that would have added to the proof of judicial bias or assisted Respondent in demonstrating cause for his failure to develop all facts in support of the judicial bias claim in an earlier state court proceeding. The state court may have concealed disqualifying facts and, as such, violated the provisions of the Arizona Code of Judicial Conduct, which require that a judge disqualify himself from a proceeding where his impartiality might reasonably be questioned or disclose on the record the basis of his potential disqualification. *See* Canons 3(E) and (F), Arizona Supreme Court Rule 81. *See Porter v. Singletary*, 49 F.3d 1483 (11th Cir. 1995) (judge's ethical breech of the duty to recuse himself or disclose potentially disqualifying facts serves as "cause" to overcome a procedural default and requires a remand to the district court for an evidentiary hearing).

Petitioner failed to raise in the Petition for Writ of Certiorari the question whether a stay based on incompetency is appropriate where the habeas petitioner's claims include *non-record-based claims*. That question, should Petitioner attempt to broaden his Petition to include it, is therefore waived. Sup. Ct. R. 15.

II. THE OPINION BELOW IS NOT IN CONFLICT WITH ANY FEDERAL STATUTES, DECISIONS OF THIS COURT, DECISIONS OF THE COURTS OF APPEALS OR OTHER LONG-STANDING PRECEDENT, INCLUDING THE COMMON LAW.

A. The Circuit's Opinion is consistent with this Court's precedent.

1. *Rees v. Peyton*, 384 U.S. 312 (1966) (*Rees I*) and *Rees v. Peyton*, 386 U.S. 989 (1967) (*Rees II*).

Although the *Rees* line of cases is one of the cornerstones of Judge Kozinski's *Rohan* Opinion, Petitioner and *Amici Curiae* fail to distinguish *Rohan* and all concurring circuit decisions from *Rees*. Curiously, they do not make a *single* mention of the case.

Over 45 years ago, this Court twice addressed similar questions to the one posited here. In *Rees I*, 384 U.S. 312, and *Anderson v. Kentucky*, 371 U.S. 886 (1962) (*Anderson I*), this Court confronted the issue of determining whether to allow death-row prisoners to withdraw their pending petitions for writ of certiorari (from a federal habeas corpus proceeding in *Rees*; from a direct capital appeal in *Anderson* (*Anderson v. Commonwealth*, 353 S.W.2d 381, 383 (Ky. 1961) (describing the defendant's desire to forego his direct capital appeal)). In both instances the Court concluded that death-sentenced petitioners needed to be competent to make such important decisions. *Rees I*, 384 U.S. at 312-14; *Anderson I*, 371 U.S. at 886 (granting certiorari to Court of Appeals of Kentucky to determine competency).

In *Rees I*, this Court ordered the district court to determine whether the petitioner in a habeas corpus case was competent to make the decision to withdraw his pending certiorari petition and forego any further legal proceedings. 384 U.S. at 313-14. This Court recognized that the petitioner's "mental competence [was] of prime importance" to the resolution of this question and concluded that it was not "in a position to determine what disposition should be made of Rees's petition for certiorari" until after the district court had determined whether Rees was competent. *Id.*

As a result of the mental status of each petitioner and the related concerns about competency, this Court stayed each proceeding indefinitely. On April 10, 1967, this Court ordered, "This case is held without action on the petition until further order of the Court." *Rees II*, 386 U.S. 989. Before that, this Court "continued [Mr. Anderson's matter] indefinitely." *Anderson*, 376 U.S. at 940. Finally, on October 2, 1995, this Court dismissed Rees's Petition for Writ of Certiorari.[2] *Rees v. Superintendent of Virginia State Penitentiary*, 516 U.S. 802 (1995) (*Rees III*). Further, Mr. Anderson's case remained on this Court's docket until over a year after his death. *See Anderson v. Kentucky*, 515 U.S. 1155 (1995) (*Anderson II*) ("It appearing that petitioner died April 6, 1994, the writ of certiorari is dismissed as moot.").

The course of action taken in the *Rees* cases was not arbitrary; this Court clearly considered its options before remanding the petitioner for a competency determination. Information contained in *Rees's* unpublished record, and

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2. It appears the matter was dismissed because the Petitioner died. *Rohan*, 334 F.3d at 815 n.8.

reviewed by the Circuit Court in *Rohan*, shed light on this Court's actions and the rationale behind them.[3]

On the one hand, the state in *Rees I* urged this Court to decide the certiorari petition before it and ignore the competency issue until the proceedings concluded at execution. *Rohan*, 334 F.3d at 815. Petitioner has embraced this argument, asserting the only competency determination left for Respondent is governed by *Ford*. 477 U.S. 399 (1986) (setting standard for competency to be executed). However, this Court in *Rees I* rejected the argument that "under no circumstances should this matter be further stayed." *Id.* (citing to State's Memorandum at 3, *Rees v. Peyton*, Misc. No. 9 (U.S. Mar. 14, 1967)). This Court also considered simply staying Rees's proceedings without a remand but decided against it. *Rees I*, 384 U.S. at 314. Instead, this Court chose to remand the matter to the district court to determine "whether [Rees] has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." *Id.* at 313.

The Circuit Court adopted this Court's prudent course of action in *Rees II*, concluding: "We obviously presume that the Supreme Court follows the law even when acting through summary orders rather than reasoned opinions. The record in *Rees* . . . shows that incompetence is grounds for staying habeas proceedings." *Rohan*, 334 F.3d at 815.

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3. The Circuit Court took judicial notice of the unpublished record in *Rees* and considered it in its decision. *Rohan*, 334 F.3d at 815 n. 7-8.

2. *Ford v. Wainwright*, 477 U.S. 399 (1986).

When incompetency arises at a much later stage, i.e., *after* the habeas litigation has been completed and relief has been denied, a petitioner's competency for execution is governed by *Ford v. Wainwright*. *See Martinez-Villareal v. Stewart*, 118 F.3d 625, 626 (9th Cir. 1997), *aff'd*, *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998). *Ford* concerned whether Florida could execute a prisoner who had already exhausted all direct and collateral remedies, but whose counsel raised the issue of whether the petitioner was *then* competent, or "sane," to be executed. *Ford*, 477 U.S. at 401-05. Justice Powell found it significant that "[o]*nly after all of these challenges* [a direct appeal and collateral federal habeas proceeding] *had been resolved against him did* [Mr. Ford] challenge his impending execution on the ground of insanity." *Id.* at 420 n.1 (Powell, J., concurring) (emphasis added).

Justice Powell addressed competency's meaning in the specific context of the condemned prisoner whose direct and collateral attacks had been completed, i.e., where the only remaining issue was whether the Eighth Amendment forbids execution of the insane. Justice Powell's concurrence thus addressed only the specter of execution of the insane, not the specter of the incompetent capital petitioner's inability to assist counsel during the entire course of post-conviction habeas proceedings. In that limited context, Justice Powell found the Blackstone rationale that insane inmates could not be executed to have "slight merit today." *Ford*, 477 U.S. at 420. As Justice Powell explained:

> *Modern practice provides far more extensive review of convictions and sentences than did the*

> *common law, including* not only direct appeal but ordinarily both state and *federal collateral review. Throughout this process, the defendant has access to counsel*, by constitutional right at trial, and by employment or appointment at other stages of the process . . . .

Id. at 420-21 (emphasis added). Were the Court to overrule *Rohan*, it would remove the doctrinal underpinnings of *Ford*.

The *Ford* Court concluded: "It is no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from comprehending the reasons for the penalty or its implications." *Id.* at 417. Both the majority and concurring opinions recognized by implication that Blackstone's rationale is still valid under circumstances where the inmate's ability to assist counsel remains essential, i.e., *during* the course of direct and collateral review, as opposed to the situation in *Ford*, where all possible attacks on the judgment and sentence had already been exhausted. *Id.* at 399, 420. Such collateral habeas corpus actions "[a]*re a central part of the review process for prisoners sentenced to death.* As Justice Stevens observes, a substantial proportion of these prisoners succeed in having their death sentences vacated in habeas corpus proceedings." *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring). (emphasis added).

Therefore, a condemned inmate's mental competency to *proceed* with federal habeas corpus must be measured under a higher standard than that defined in *Ford* for execution. Applying this Court's precedent, the Circuit Court in *Rohan* observed that *Ford* implicitly "reinforces

the importance of competence to pursue collateral review" in capital cases. 334 F.3d at 811. The applicable standard was defined over thirty years ago, in *Rees I*. As stated above, this Court in *Rees I* rejected the idea that the only competency right remaining for a capital petitioner in certiorari proceedings was whether a capital petitioner was competent to be executed. 384 U.S. at 313-14.

The Circuit Court in *Rohan* recognized that the right to be competent to pursue federal habeas relief falls somewhere between the right to be competent to stand trial and the right to be competent to be executed. 334 F.3d at 810. The "constitutional requirement of competence to stand trial . . . does not imply a coordinate requirement on collateral review," which is more limited and during which there is no constitutional right to counsel. *Id.* (citations omitted). However, the Circuit Court also recognized that "Justice Powell's *Ford* opinion does not *preclude* such a requirement" during federal habeas proceedings, because *Ford* involved the competency of a petitioner who had already exhausted all avenues of review of his sentence. *Id.*; *see Ford*, 477 U.S. at 420 n.1.

B. There is no conflict in the circuits.

No circuit court of appeals has rejected *Rohan*. In *Holmes v. Buss* (*Holmes I*), 506 F.3d 576 (7th Cir. 2007), Judge Richard Posner writing for the three-judge panel, remanded the case to the district court for further competency determinations. *Id.* at 584. In prior proceedings, the district court had found the capital petitioner competent without consulting a mental health expert and had subsequently rejected all of the petitioner's habeas claims on the merits. *Id.* at 577. After the Seventh

Circuit remanded for a more thorough competency determination, the district court personally questioned the capital habeas petitioner and accepted reports from defense and prosecution mental health experts before deciding, again, that the petitioner was competent to proceed. *Id.* at 577-78. On appeal, the Seventh Circuit once again remanded for an evidentiary hearing, finding the district court had erroneously denied defense counsel's request to cross-examine the state's mental health expert. *Id.* at 581, 583-84.

Judge Posner did not make an affirmative holding regarding the existence of the right to *Rohan* competency in *Holmes I*. Because the parties had assumed the validity of *Rohan*, Judge Posner determined that the better course was to continue this assumption and order a determination of competency without first deciding whether the right to competency existed. *Id.* at 578. Assuming the validity of *Rohan* allowed Judge Posner to avoid formally adjudicating the matter, thus foreclosing the potential creation of an inter-circuit conflict. *Id.*

After the district court heard additional competency evidence and, for a third time, denied the petitioner's request for a stay due to incompetence, Judge Posner again reversed, adopting *Rohan* and finding that the evidence supported the petitioner's claim of incompetence. *Holmes v. Levenhagen* (*Holmes II*), 600 F.3d 756, 763 (7th Cir. 2010). The court then stayed Holmes's habeas corpus proceedings indefinitely. *Id.* at 762-63. Despite the Seventh Circuit's earlier concern regarding a potential circuit split, the law of the Seventh Circuit is now consistent with that of the Ninth Circuit—there is a right to competence to proceed in federal habeas corpus.

Petitioner also argues that the benefit *Rohan* confers is minimal because Section 2254 is intended to gain review of claims that were exhausted in the state courts and therefore the *Rohan* right is extremely limited. Pet. at 13. Petitioner adds that the information Respondent could contribute to his case is limited. Pet. at 13. However, in addition to the judicial bias claim, which Petitioner, the district court and the Circuit Court have all previously conceded could potentially benefit from Respondent's assistance,[4] Respondent has highlighted six claims which also require his input. Pet. App. at C-27. See also Argument I. C, *supra*.

As Judge Posner noted in *Holmes I* and *II* the degree to which a petitioner needs to be competent "depends on the nature of the decisions" to be made. 600 F.3d at 759. Judge Posner recognized that where the petitioner's "recollections could help his lawyers formulate a persuasive argument" then he must be competent to do so. *Id.*

Critical to Respondent's judicial bias claim in this matter is the fact that "[Respondent] was at his trial; his current lawyers were not." *See Holmes I*, 506 F.3d at 580. This discounts Petitioner's argument that others, including prosecutors, could fill in the gaps in Respondent's memory. Pet. at 17. Petitioner also chastises the Circuit Court for not specifying what Respondent could contribute to his judicial bias claim. Pet. at 11. Petitioner ignores Judge Kozinski's response to this argument "Well, if I knew that, I wouldn't have to ask!" *Rohan*, 334 F.3d at 818 (emphasis original). Sometimes common sense should prevail.

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4. See Statement of the Case, *supra*.

Petitioner attempts to discount the Seventh Circuit's decisions in *Holmes I* and *II* as irrelevancies because Indiana failed to challenge the right recognized by the Ninth Circuit in *Rohan*, only contesting whether Holmes was incompetent. Pet. at 12 n.5. Whatever Indiana's reason for not challenging the application of *Rohan*, the Seventh Circuit could think of no better solution than to indefinitely stay the habeas proceedings of the incompetent Holmes. 600 F.3d at 762-63. Despite assuming the validity of *Rohan* in *Holmes I*, the Seventh Circuit nevertheless thoroughly analyzed the rationale for, and the implications of, recognizing a right to *Rohan* competency in both *Holmes I* and *II*, ultimately determining that *Rohan* provided both the appropriate competency standard and the most appropriate relief for Holmes. *Holmes I*, 506 F.3d at 578-80; *Holmes II*, 600 F.3d at 758-59, 762-63.

Furthermore, the other circuits to discuss the issue have not rejected *Rohan*, but rather have either assumed that the right exists or have resolved the competency issue on other grounds. *See Ferguson v. Sec'y for Dep't of Correct.*, 580 F.3d 1183, 1222 (11th Cir. 2009) (assuming there is a right to be competent in the district court in habeas, the district court did not abuse its discretion in denying the stay); *Ward v. Norris*, 577 F.3d 925, 936-37 (8th Cir. 2009) (holding that the district court correctly construed Rule 60(b) motion as successive petition because it was based upon previous habeas counsel's ineffectiveness for failing to raise petitioner's competency in the district court); *Clayton v. Roper*, 515 F.3d 784, 790 (8th Cir. 2008) (assuming there is a right to be competent in federal habeas proceedings, the district court's finding that the petitioner was competent was not clearly erroneous); *Paul v. United States*, 534 F.3d 832, 845-48 (8th Cir. 2008)

(same); *Pierce v. Blaine*, 467 F.3d 362, 373 (3d Cir. 2006) (refusing to accept review of a district court's decision to evaluate the petitioner's competency but noting that the order was "not clearly beyond the discretion of the district court in aid of its jurisdiction"); *Mines v. Dretke*, 118 Fed. Appx. 806, 813-14 (5th Cir. 2004) (holding it was not abuse of discretion to deny a stay, assuming there was a right to be competent, because petitioner presented no evidence of incompetency).

Also instructive is *Mata v. Johnson*, 210 F.3d 324 (5th Cir. 2000), a case that predates *Rohan*. In *Mata*, the Fifth Circuit also relied on *Rees I* and gleaned from this Court's reasoning that district courts were directed to conduct hearings suitable to address the issue of competency, which was presumed to include input from psychiatric and other medical experts. 210 F.3d at 327-28. The Fifth Circuit further noted that following *Rees I*, it would address the issue of competency to waive collateral review of a state conviction and sentence. *See Rumbaugh v. Procunier*, 753 F.2d 395, 403 (5th Cir. 1985). Applying *Rees I*, the Fifth Circuit established a three-part test for district courts to apply when considering competency issues: "(1) whether that person suffers from a mental disease, disorder, or defect; (2) whether a mental disease, disorder, or defect prevents that person from understanding his legal position and the options available to him; and (3) whether a mental disease, disorder, or defect prevents that person from making a rational choice among his options." 210 F.3d at 328 (citing *Rumbaugh*, 753 F.2d at 398). Following this Court's precedent, the Fifth Circuit in *Mata* was clear about the federal constitutional implications involved with competency determinations in federal habeas corpus proceedings.

Similarly, federal courts within the Sixth Circuit have not only assumed there is a right to be competent during federal habeas proceedings, but have also held that a capital habeas petitioner must be competent to withdraw his federal habeas corpus petition. *See Carter v. Bradshaw*, 583 F. Supp. 2d 872, 984-85 (N.D. Ohio 2008). In *Carter*, the district court concluded that while *Rohan* was not binding precedent, in the Sixth Circuit, "it remains the standard by which the Court should review Carter's competence." *Id.* at 877. The district court relied on the fact that "it appears that no court has rejected the *Rohan* holding outrightly," as well as the fact that the Sixth Circuit in *Awkal*[5] applied this Court's reasoning in *Rees* to require that a federal habeas petitioner be competent to withdraw his federal habeas petition. *Id.* at 879. "Because the *Rohan* holding remains intact and, if *Awkal* is any indication, may actually be adopted by the Sixth Circuit, the Court sees no reason to depart from its earlier conclusion that the *Rohan* holding is the standard of review here." *Id.*

Because the circuits that have addressed the question presented are in agreement, the petition should be denied.

C. The Opinion is consistent with the Common Law.

Petitioner's argument that the Circuit Court created the *Rohan* right "out of thin air" (Pet. at 7) ignores this

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5. *Awkal v. Mitchell*, 174 Fed. Appx. 248, 249-50 (6th Cir. 2006) (remanding to the district court for a determination of whether petitioner was competent to withdraw his appeal under the Rees standard).

Court's precedent and the Common Law's role in this matter. It is the Common Law that informs this Court's interpretation of the Bill of Rights. *See Cunningham v. California*, 549 U.S. 270, 281 (2007) (Common Law was viewed in *Apprendi* and *Ring* as informing Sixth Amendment, which requires juries to find facts, and to find them beyond a reasonable doubt, in order to elevate sentences); *Deck v. Missouri*, 544 U.S. 622, 626 (2005) (Common Law prohibited shackling of defendant in criminal trial; due process violated in state capital trial where defendant was shackled); *Crawford v. Washington*, 541 U.S. 36, 42-57 (2004) (Common Law informs the scope of the Confrontation Clause). While this Court has long found these trial rights derived from the Common Law, the Circuit Court in *Rohan* thoroughly traced the Common Law history of the right to competence in criminal proceedings in which the death penalty is or may be imposed, and concluded that the right extends until a condemned prisoner's execution.

An incompetent condemned prisoner's inability to assist counsel was recognized under English Common Law as a ground for staying proceedings because the condemned prisoner was unable to assist with the legal process which might preclude execution. *See* 4 Sir William Blackstone, *Commentaries on the Laws of England*, *24-25, *389, *395-96 (1769); 1 Sir Matthew Hale, *The History Of The Pleas Of The Crown*, 34-35 (Prof'l Books Ltd. 1971) (1736); Sir John Hawles, *Remarks on the Trial of Mr. Charles Bateman* (1719), *reprinted in* 11 State Trials 473, 476 (T.B. Howell ed., 1811). The Circuit Court's careful review of the Common Law jurisprudence regarding competency in *Rohan* demonstrates that the right has a long and well-established pedigree that attaches not only

to trial, but continues through to execution of sentence. 334 F.3d at 807. The Common Law commentators all tied "competence to capacity for rational communication." *Id.* at 807-08. If the condemned prisoner became of unsound mind at any point before execution, the proceedings were to be stayed. *Id.* The rationale behind this rule was that the condemned prisoner's mental disorder might prevent him from sharing with his lawyer a fact, known only to him, that could result in his life being spared. *Id.* This rationale is just as relevant today.

D. The Opinion does not undermine the AEDPA or 18 U.S.C. § 3599(a)(2).

Petitioner argues that petitioners who file a habeas petition and then bring a motion for a *Rohan* stay, undermine one purpose of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2241 *et seq.*, which is to speed capital habeas cases to a conclusion. Pet. at 12. By that same logic, this Court incorrectly decided *Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010), which recognized for the first time the principle of equitable tolling. Equitable tolling is not prescribed in the AEDPA, but this Court, like virtually all of the circuits, concluded that there are rare times where the courthouse doors should not be closed where the petitioner is not at fault in failing to timely bring his claims. Likewise, the Circuit Court has long recognized mental incapacity as an extraordinary circumstance justifying equitable tolling. *See Rohan*, 334 F.3d at 814-15 (citations omitted).

Petitioner's accusation that *Rohan* motions are being filed for purpose of delay is not supported by citation to any authority, nor is it supported by the legal landscape

in the circuits and district courts, as set forth in Section III, *infra*. In fact, *Rohan* incompetency findings are rare and stays even more so.

Congress's statutory enactments in the field of habeas corpus, including the AEDPA, do not operate in a vacuum. They are directed at "eliminat[ing] delays in the federal habeas review process . . . . without undermining basic habeas corpus principles and while seeking to harmonize the new statute[s] with prior law . . . ." *Holland*, 130 S. Ct. at 2562 (citing *Slack v. McDaniel*, 529 U.S. 473, 483 (2000)). In its effort to position itself behind what it sees as Congress's rejection of a right to be competent in federal habeas proceedings, Petitioner overlooks two important aspects of any inquiry into Congress's intent in enacting 18 U.S.C. § 3599(a)(2) and its predecessor statute. First, nothing in the text of that statute specifically disavows this Court's precedent that a death row prisoner has the right to competency in federal habeas proceedings. *See Rees I* and *II*, *supra*. Second, Congress presumably enacted § 3599 and its predecessor statute against the backdrop of the Common Law. *See, e.g.*, *Astoria Fed. Sav. & Loan Ass'n v. Salimino*, 501 U.S. 104, 108 (1991) ("Congress is understood to legislate against a background of common-law adjudicatory principles.").

The interplay between the AEDPA's statute of limitations and this Court's decisions since the enactment of the statute are instructive in this matter. The AEDPA's statute of limitations is subject to equitable tolling if extraordinary circumstances prevent the petitioner from timely filing a petition. *See Holland*, 130 S. Ct. at 2562 (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). These extraordinary circumstances can include a

prisoner's mental illness or incompetence. *See Bolarinwa v. Williams*, 593 F.3d 226, 231 (2d Cir. 2010) (citing decisions of the Third, Fifth, Sixth, and Ninth Circuits). Like the right to competency, the equitable-tolling doctrine was never expressly ratified or rejected by Congress when it enacted the AEDPA. Yet, "Congress enacted AEDPA" after this Court had expressly reaffirmed the equitable-tolling doctrine in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), and Congress therefore "was likely aware that courts, when interpreting AEDPA's timing provisions, would apply" the doctrine unless Congress expressly disavowed it. *Holland*, 130 S. Ct. at 2561. Because Congress did not expressly disavow the doctrine when it enacted § 2244(d), equitable tolling applies to the AEDPA's statute of limitations.

Similarly, Congress enacted § 3599's predecessor statute after *Anderson* and *Rees*, and thus presumably was aware that even with appointed counsel, indefinite stays of federal habeas actions were available in the event of a petitioner's incompetence. *See Rees*, 386 U.S. 989, *cert. dismissed*, 516 U.S. 802 (1995). The right of competency in federal habeas that existed at Common Law, *see Rohan*, 334 F.3d at 807-10, that this Court vindicated in *Anderson* and *Rees*, therefore remains part of federal habeas jurisprudence after the AEDPA.

Further, Petitioner asserts that the Circuit Court has engaged in policy analysis as part of its statutory construction of § 3599(a)(2) where no such statutory construction is permitted because one can view the wording of the statute to understand that Congress did not include reference to a stay based on incompetence. Rather than speaking to competency, the statute fails

to address it altogether. *See* 18 U.S.C. § 3599. As Judge Kozinski made clear, however, the Framers did not include a right to trial competency in the Sixth Amendment, but this Court found such a right vital to protect the right to counsel. *Rohan,* 334 F.3d at 813.

III. PETITIONER'S CLAIM THAT THE CIRCUIT COURT'S OPINION HAS CAUSED SIGNIFICANT DELAYS ACROSS THE CIRCUITS IS LEGALLY AND FACTUALLY ERRONEOUS.

Petitioner's hysterical claim that Judge Kozinski's opinion will subvert habeas corpus is unfounded. Petitioner argues that *Rohan* allows capital habeas petitioners to abuse the writ by engaging in "delaying tactics" to "avoid execution." Pet. at 18. *Amici Curiae*[6] also focus on the concern that *Rohan* claims will allow capital habeas petitioners to indefinitely delay their executions thus frustrating the state's interest in executing its criminal judgments. *See* Brief for State of Utah *et al.* as *Amici Curiae, passim.*

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6. The grouping of the represented states in this *Amici Curiae* is peculiar. First, the State of California is clearly not supporting the *Amici Curiae's* position and favors the *Rohan* rule since that attorney general has previously stipulated to incompetency stays in *Rohan* cases. See n.9, *ante.* California's agreement with the *Rohan/Rees* line of cases is significant since that state seems to be the most affected by this issue, albeit still in few numbers. *Amici Curiae* at p. 4 n.2.

In addition, although Delaware, Pennsylvania, South Carolina, and Virginia are listed as interested states in the *Amici Curiae,* none was cited as having *Rohan* litigation, and the Fourth Circuit has not weighed in on this issue. As such, these states seem to lack standing and their participation appears to be an attempt by Petitioner to overstate the opposition to *Rohan's* application.

Petitioner's portrayal of competency proceedings in habeas would lead a novice to believe that *Rohan* stays are freely dispensed. The *Rohan* competency right is narrow in scope and the *Rohan* standard is demanding. A federal habeas petitioner has a right to *Rohan* competence only if he raises claims which could benefit from his ability to rationally communicate information lying uniquely within his own private knowledge, *Rohan*, 334 F.3d at 818-19, or if his incompetence prevents him from rationally making an important decision which he alone can make. *Rees I*, 384 U.S. at 314; *see also Holmes II*, 600 F.3d at 762. Furthermore, *Rohan* competency is not required in cases where appointment of a next friend or guardian ad litem would adequately protect the petitioner's rights and interests. *See Rohan*, 334 F.3d at 816.

The evidence supports the assertion that this is a high burden for incompetents to meet. *Amici Curiae* list several cases in support of their substantial delay argument. *Amici Curiae* at p. 4 n.2. And while only *one* case involved a petitioner who was found incompetent, *none* of the cases listed was stayed indefinitely. *See Blair (James Nelson) v. Cullen*, No. CV 99-6859, 2010 WL 5563896, at *25 (C.D. Cal. March 21, 2010) (finding that the presumption of Petitioner's competency has not been overcome by a preponderance of the evidence); *Lewis v. Ayers*, No. CIV S-02-0013, 2010 WL 364504, at *10 (E.D. Cal. Jan. 26, 2010) (denying petitioner's motion to have himself declared incompetent and to have his proceedings stayed); *Rogers v. McDaniel*, No. 3:02-CV-0342, 2008 WL 820088, at *3 (D. Nev. March 24, 2008) (district court found petitioner competent to proceed and amended habeas petition was filed December 14, 2006); *Hill v. Ayers*, No. 4-94-CV-641, 2008 WL 683422, at *2 (N.D. Cal. March 10,

2008) ("Respondent is correct that it would be premature for the Court to stay the proceedings at this time. Rather, the parties shall meet and confer to attempt to stipulate to a case management schedule that will allow for Petitioner to be examined by mental-health experts to determine his competence."). Three Arizona cases were also cited in support of *Amici Curiae's* substantial/indefinite delay argument. Of those, two petitioners have died.[7] The third, Respondent, has not yet been determined incompetent and, therefore, his case has not been indefinitely stayed.[8]

In the almost *eight* years since the *Rohan* decision, Petitioner and Respondent have only been able to cite to a few cases where incompetency has been found by the courts. Moreover, Petitioner's fear of an indefinite stay is overstated as noted by Judge Posner in *Holmes I*: "[I]t is odd to think that someone who initiates a proceeding can then freeze it by claiming to be mentally incompetent." 506 F.3d at 578.

Not all states with *Rohan* litigation oppose the process. In several California cases, the attorney general

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7. Undersigned counsel's office represented both Mr. Nash and Mr. Adams. Mr. Nash died of natural causes at age 94. Petitioner asserted "Adams died waiting (sic) a decision in his case." Pet. at 6 n. 2. In fact, Mr. Adams committed suicide as a result of his mental illness.

8. In terms of delay, Petitioner asserts that Respondent's "case has now been under federal review for over a decade. . . ." Pet. at 19. However, for three and a half years the proceedings were either stayed by the district court pending a resolution of the *Ring v. Arizona* litigation, (see 536 U.S. 584 (2002) or awaiting rulings from the district court. *Gonzales v. Schriro*, No. CV-99-02016 (D. Ariz.).

stipulated to a petitioner's incompetency, and the courts made clear that the resultant stays could be lifted if the petitioner was restored to competency.[9] California's position on this issue is important, since its interest in this litigation appears to be substantial. *See Amici Curiae* at 4, n.2. It is of note that California did not join in the *Amici Curiae*.

Petitioner fails to provide any support for the proposition that the *Rohan/Rees* line of cases has had any widespread affect in the last eight years. In fact, as demonstrated above, the narrow scope of the decision, coupled with the high burden of proof, has proven beneficial to the states in some cases where those attorneys general have stipulated to incompetency.

IV. CERTIORARI SHOULD NOT BE GRANTED BECAUSE PETITIONER FAILED TO RAISE SEVERAL POLICY ARGUMENTS IN THE LOWER COURT; NONETHELESS THOSE ARGUMENTS ARE MERITLESS.

A. Petitioner's failure to raise arguments resulted in waiver.

Petitioner raises two arguments it did not present below: (1) that implying a right to competency in habeas will result in disparate treatment of non-indigent habeas appellants because the habeas counsel appointment statute does not apply to them (Pet. at 15); and (2) that

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9. See *Jones v. Wong*, 2:97-CV-02167 (E.D. Cal. Aug. 28, 2009); *Holt v. Woodford*, 1:97-CV-06210 (E.D. Cal. Nov. 21, 2008); *Millwee v. Ayers*, 2:99-CV-07220 (C.D. Cal. Nov. 21, 2008); *McPeters v. Ayers*, 1:95-CV-05108 (E.D. Cal. Sept. 18, 2007).

finding a right to competency is "inconsistent" with this Court's "next friend" jurisprudence. Pet. at 14.

This Court ordinarily "does not decide questions not raised or resolved in the lower court"; "[i]t is only in exceptional cases coming [to the Court] from the federal courts that questions not pressed or passed upon below are reviewed." *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (*per curiam*) (citation omitted). Respondent was ably represented in the proceedings below and had ample opportunity to give the Circuit Court an opportunity to examine these issues. *Cf. Pollard v. United States*, 352 U.S. 354, 359 (1957) (finding an exceptional circumstance and reviewing additional legal questions not presented in the lower courts because prior pleadings had been filed without the assistance of counsel); *United Bhd. of Carpenters & Joiners of Am. v. United States*, 330 U.S. 395, 399-400 (1947) (finding that although employers did not raise issue in lower courts, the unions did, and because both would be entitled to use the issue as a defense to the indictment, fairness compelled its consideration). There is no exceptional reason which allows for consideration of these newly raised issues.

Regardless of any waiver, these arguments have no merit. However, in an abundance of caution, Respondent will address the merits of the waived claims as follows:

B. The Opinion does not create an equal protection dilemma.

Petitioner argues that the Circuit Court's interpretation of § 3599(a)(2) would lead to the disparate treatment of indigent capital petitioners (who would have a right to

be competent to assist counsel) and non-indigent capital petitioners (who, according to the State, indisputably do not have such a right). Pet. at 15. Petitioner argues that *Rohan* requires that indigent capital habeas petitioners entitled to counsel benefit from *Rohan* where paying petitioners are not afforded *Rohan's* benefit. However, the Circuit Court, when deciding *Rohan*, only had before it the claim that an indigent capital petitioner was incompetent and could not assist counsel. The Circuit Court went to great pains to explain that it was deciding the case on the most narrow constitutional grounds in keeping with "the principle that statutes should be interpreted to avoid substantial constitutional questions." *Rohan*, 334 F.3d at 813. The Circuit Court further stated that "Rohan's due process claim is debatable, but it raises constitutional questions substantial enough that we should avoid them if possible. By reasonably construing 21 U.S.C. § 848(q)(4)(B) to incorporate a statutory right to competence, we leave them for another day." *Id.* at 814. As a result, whether a paying petitioner can assert the right is left for another case and is not appropriate in this case on the record before the Court.

C. The Opinion does not undermine the "Next Friend" practice.

Petitioner argues that the Circuit Court's interpretation of 18 U.S.C. § 3599(a)(2) conflicts with this Court's "next friend" jurisprudence. Pet. at 14. Petitioner makes the argument rejected in *Rohan* that a next friend can ably bring the incompetent's claims despite his incompetency. Pet. at 14 (citing *Whitmore v. Arkansas*, 495 U.S. 149 (1990)). The problem with that argument, as noted in *Rohan*, is that *Rohan* concerns competency to assist

counsel, not to merely make decisions affecting litigation, such as the decision to waive claims as in *Whitmore*. 334 F.3d at 816. As Judge Kosinski noted:

> The prisoner's incompetence is relevant, not because it impairs his decisionmaking, but because it prevents him from communicating information that he alone possesses. Appointing a next friend does not respond to this dimension of incompetence-particularly where, as here, the next friend is an attorney with no greater knowledge of [the petitioner's] circumstances than his counsel.

Id. In fact, the Circuit Court specifically approved of the "next friend" option in some cases of incompetency: "When grounds for relief are apparent even without the prisoner's assistance, a next friend could conclude that the prisoner's best interests would be served by pursuing relief notwithstanding his incompetence." *Id.* at 816.

The "next friend" practice is not ignored by the *Rees/Rohan* line of cases. In fact, *Holmes II* also clearly and thoroughly explains when appointment of a next friend (*guardian ad litem*) may and may not be of use in the case of an incompetent habeas petitioner. 600 F.3d at 763. In *Holmes II*, Judge Posner was concerned with the petitioner's ability to rationally decide whether to pursue an incompetency claim or waive the claim and have his habeas case decided on the merits. *Id.* at 758-59, 763. The Seventh Circuit noted that a guardian ad litem would easily be able to make this decision for a petitioner who has a sure-winner habeas claim but that, in closer cases,

the guardian ad litem's decision "would be exceedingly difficult" in the absence of the petitioner's rational input. *Id.* at 764.

In this matter, Petitioner's argument that this Court's recognition of next friend standing proscribes *Rohan* claims fails in light of the rationale expressed in *Rohan* and *Holmes II*. Recognition of a right to competence in habeas proceedings is not at odds with the next friend practice. In some habeas cases, appointment of a next friend will adequately safeguard the incompetent petitioner's interests; in others, it will not.

Furthermore, while the Circuit Court in *Rohan* did discuss the "next friend" practice as set forth above, in Respondent's case, the next friend process was not discussed by the Circuit Court, nor was this issue raised by Petitioner. Perhaps because that argument would have been premature since the appointment of a "next friend" is not even relevant until *after* a determination of incompetency is made, and as such is not relevant in this matter.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted this 25th day of April 2011.

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APPENDIX

APPENDIX A — PETITIONER'S MOTION FOR COMPETENCY DETERMINATION AND TO STAY PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, DATED FEBRUARY 23, 2006

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

NO. CIV 99-02016-PHX-SMM

DEATH PENALTY CASE

Ernest Valencia Gonzales,

Petitioner,

v.

Dora B. Schriro, Et. Al.,

Respondents.

Petitioner's Motion for Competency Determination and to Stay Proceedings

Appendix A

Counsel for Petitioner, Ernest Valencia Gonzales, move this Court for a competency determination of Mr. Gonzales and an Order staying these proceedings while the competency determination is being completed. This request is being made pursuant to *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803 (2003). The reasons for this request are set forth in the accompanying Memorandum of Points and Authorities. Counsel for Respondents, John Todd, indicates that he objects to the request to stay the proceedings and will be stating his position regarding the need for a competency determination in this case in a responsive pleading.

Memorandum of Points and Authorities

In *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 812-13, 818 (2003), the Ninth Circuit Court of Appeals recognized that the statutory right to counsel in capital cases incorporates a concomitant right to competence for all proceedings, including proceedings seeking collateral relief.

As explained in detail below and in the attached supporting documentation, serious questions regarding Mr. Gonzales' competency have arisen. Counsel for Mr. Gonzales move for a competency determination pursuant to *Rohan*.[1]

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1. Counsel for Mr. Gonzales, will move this Court for an Order allowing contact visits between a licensed psychiatrist, and Mr. Gonzales for the purpose of conducting the competency evaluation, once authorized.

Appendix A

I. Competence is a Prerequisite to Pursuit of Habeas Relief.

In *Rohan*, the Ninth Circuit Court of Appeals held that courts must ensure that a petitioner be competent in order to communicate rationally with his counsel. 334 F.3d at 813. The court recognized the important role federal habeas corpus plays "in promoting fundamental fairness in the imposition of the death penalty," and noted that the meaningful assistance of counsel was essential to the role of habeas in ensuring fundamental fairness. 334 F.3d at 813 (internal quotation omitted). *Rohan* framed the competency inquiry in terms of petitioner's ability to rationally communicate with counsel because counsel's ability to effectively present habeas claims "depends in substantial measure" on the client's ability to communicate. *Id.* The petitioner must be able to rationally communicate with counsel to ensure that the petitioner receives meaningful assistance of counsel. *Id.*

Rohan noted that "[t]he right to competence was firmly established at common law." 334 F.3d at 807. The court pointed out that William Blackstone, Sir Matthew Hale, and Sir John Hawles, all tied "competence to capacity for rational communication." 334 F.3d at 808. Additionally, the *Rohan* court found that the common law right to competence extended beyond the jury verdict through entry of judgment up to execution. *Id.*

While the Supreme Court has never conclusively resolved the right to competence when pursuing collateral review, *Rohan* found further support for this requirement

in that, while continuing to recognize the common law right to competence at trial as the capacity for rational communication, the Supreme Court has narrowed the right to competency at execution. *See Ford v. Wainwright*, 477 U.S. 399, 422 (1986) (Powell, J., concurring) (an individual is competent to be executed if they are aware of the punishment they are "about to suffer and why they are to suffer it").

Under *Ford*, a prisoner may be executed "even if he lacks capacity to communicate exonerating information." 334 F.3d at 812. The court observed that one of the rationales for this narrow competence requirement at execution was the safeguard of effective collateral review, a rationale that fails when federal habeas review is rendered ineffective because of a petitioner's inability to communicate rationally. 334 F.2d at 811. Where a petitioner may be executed before he is ever able to rationally communicate, the need for petitioner to assist counsel in presenting his claims in habeas proceedings is critical. A petitioner also suffers prejudice by being forced to go forward with a habeas petition while incompetent because of the strict limits on successive petitions imposed by 28 U.S.C. § 2244. 334 F.3d at 812.

Rohan makes clear that the effective pursuit of habeas relief cannot be accomplished where the petitioner is unable to rationally communicate with counsel.

> In capital cases, prisoners challenging their convictions or sentences in federal court have a right to assistance of counsel. *See* 21 U.S.C. § 848(q)(4)(B). This prescription

> reflects Congress's belief that "federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty," *McFarland v. Scott*, 512 U.S. 849, 859 (1994), and that meaningful assistance of counsel is essential to secure federal constitutional rights. Counsel's assistance, however, depends in substantial measure on the petitioner's ability to communicate with him. And if meaningful assistance of counsel is essential to the fair administration of the death penalty and capacity for rational communication is essential to meaningful assistance of counsel, it follows that Congress's mandate cannot be faithfully enforced unless courts ensure that a petitioner is competent.

334 F.3d at 812-13. Thus, competency and the ability to assist is a prerequisite to fair adjudications in capital habeas proceedings.

Rohan concluded that a right to competence at habeas is not a groundbreaking concept, citing *Calderon v. U.S. District Court*, 163 F.3d 530 (9th Cir. 1998) ("*Kelly V*") in which the court granted equitable tolling of AEDPA due to petitioner's incompetence. To not do so could "eviscerate the statutory right to counsel." 334 F.3d at 814 (quoting *Kelly V*, 163 F.3d at 541). "The prisoner's incompetence is relevant, not because it impairs his decision making, but because it prevents him from communicating information that he alone possesses. 334 F.3d at 816.

Rohan held that "if a court holds an entire trial while a defendant is incompetent, we don't review for harmless error by speculating what the defendant might have said. The error is structural. . . ." 334 F.3d at 818. When an entire habeas proceeding is completed while the petitioner is incompetent, this constitutes structural error and there is no need for a showing of prejudice. *Id.* While a court can only speculate what an incompetent petitioner may have to contribute, forcing him to proceed despite his incompetence would effectively prevent him from being able to make that contribution and "that is difficult indeed to square with 'the humanity of the English law. . . .'" *Id.*

II. Mr. Gonzales' Competency and Ability to Assist Counsel is in Doubt.

The office of the Federal Public Defender has represented Mr. Gonzales since November 30, 1999 and undersigned counsel has represented him since March 7, 2000. Counsel has observed a progressive deterioration in Mr. Gonzales' mental status for several years. As a result of years of attempted visits with Mr. Gonzales, communications with Mr. Gonzales' family, information from inmates and Department of Corrections faculty and a review of Mr. Gonzales' most recent post-conviction proceedings, as well as communication with his former post-conviction counsel, counsel for Mr. Gonzales no longer believes Mr. Gonzales can rationally communicate with counsel and assist in any meaningful manner. Counsel no longer believes that Mr. Gonzales is competent to proceed.

In addition Mr. Gonzales' mental illness rendered him unable to assist his state post-conviction counsel. Kerrie Droban attempted to represent Mr. Gonzales during his state post-conviction proceedings. Mr. Gonzales war irrational, filing numerous nonsensical letters and pleadings, many of which claimed that "ADOC officials, prisoner etc., have him attached to a telephonic, science monitor device" or some variation of that statement. (Exh. B.)[2] Ms. Droban moved the state court to find Mr. Gonzales incompetent to *assist* her. The state court ordered a Rule 11[3] evaluation conducted by Dr. Jack Potts. (Exh. C.) Dr. Potts found Mr. Gonzales psychotic and "delusional." (Exh. D.) Ms. Droban supplemented the state court record with similar findings from Dr. Scott Freeman, a psychiatrist retained by the Office of the Federal Public Defender. Dr. Freeman also found Mr. Gonzales was delusional and psychotic. (Exh. E.) Dr. Freeman filed two supplemental reports, one dated June 21, 2001 (Exh. F.) and October 22, 2001 (Exh. G.) In the latter report Dr. Freeman he concludes "that Mr. Gonzales is currently suffering from a mental disease, namely schizophrenia which renders him unable to understand the nature of the legal proceedings or to have the ability to assist counsel in the preparation of his defense, specifically, the post-conviction relief (or Rule 32) proceedings" (Exh. G at 3.) In addition Ms. Droban

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2. Because of the number of letters, counsel for Mr. Gonzales will present the remaining letters to this Court, during supplemental briefing and/or an evidentiary hearing, should one be granted by this Court.

3. Ariz. R. Crim. P. 11, ("Incompetency and Mental Examinations").

supplemented the state court record with similar findings from Dr. Jose LaCalle. (Exh. H.)

Despite Ms. Droban's, attempt to focus the state court on Mr. Gonzales' competency to assist, the court focused on his competency to represent himself. (Exh. I.) Respondents argued that a finding of incompetency was irrelevant to those proceedings. (Exh. J.)

Despite Ms. Droban's attempts to have the proceedings held in abeyance until Mr. Gonzales' regained competency (Exh. K.), the state court found this claim was not cognizable (Exh . L)

Since his second state post-conviction proceedings finalized in October 2003, undersigned counsel has attempted to communicate with Mr. Gonzales, in order to move to amend these federal habeas proceedings with potentially exhausted claims. Counsel and support staff have attempted twenty-six visits since 2003. In addition, counsel has attempted visits with Mr. Gonzales to discuss these upcoming proceedings, including merits briefing and requests for evidentiary development. Mr. Gonzales is still refusing visits. Now counsel for Mr. Gonzales is at a critical stage in his habeas proceedings and Mr. Gonzales' input is necessary.

Mr. Gonzales' mental status has been progressively deteriorating for several years. Because competency can change, depending on the underlying cause, counsel has attempted visits, correspondence and communication through family member and even other inmates. Concerns however, have been expressed by Mr. Gonzales' family, other inmates and prison corrections officers.

III. Mr. Gonzales' Assistance is Essential.

Most recently, this Court has ruled on the procedural posture of Mr. Gonzales' claims and has requested merits briefing on several claims, including requests for evidentiary development. Counsel needs input from Mr. Gonzales on the following claims: Claim Five, Seven, Nine, Fifteen, Seventeen, Twenty-six, Twenty-nine, Thirty, Thirty-four, Forty-one and Forty-six. These include ineffective assistance of counsel claims and/or claims that turn on Mr. Gonzales' state of mind. *See* Order re: Procedural Status of Claims at 33-36. (Dkt. 97.) Presentation of these claims requires Mr. Gonzales' assistance, something counsel believes Mr. Gonzales is unable to provide. Given these facts, and pursuant to *Rohan*, a competency determination is essential.

Rohan recognized that communication with counsel is a prerequisite to a fair adjudication of federal habeas claims:

> . . . [W]e hold that, where an incompetent capital habeas petitioner raises claims that could potentially benefit from his ability to communicate rationally, refusing to stay proceedings pending restoration of competence denies him his statutory right to assistance of counsel, whether or not counsel can identify with precision the information sought.

334 F.3d at 819. Mr. Gonzales has been directed to brief the merits of his remaining claims which include ineffective assistance of counsel claims and/or claims that turn on Mr. Gonzales' state of mind. To present these

claim adequately, Mr. Gonzales' assistance is required but is unavailable due to his incompetence.

IV. Conclusion.

For the foregoing reasons it is requested that Petitioner, Ernest Valencia Gonzales, be evaluated for the purpose of determining whether he is currently competent.

Further, it is requested that these proceedings be stayed pending the determination of competency. As stated above, counsel for Respondents, John Todd, indicates that he objects to the request to stay the proceedings and will be stating his position regarding the need for a competency determination in this case in a responsive pleading.

Respectfully submitted this 23rd day of February, 2006.

Jon M. Sands
Federal Public Defender
District of Arizona

Leticia Marquez
Assistant Federal Public Defender

By /s/_____
Counsel for Petitioner

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, FILED JANUARY 17, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-99-2016-PHX-SMM

DEATH PENALTY CASE

Ernest Valencia Gonzales,

Petitioner,

vs.

Dora B. Schriro, et al.,

Respondents.

ORDER

Pending before the Court is Respondents' motion for reconsideration of this Court's Order granting an evidentiary hearing to determine Petitioner's competency to assist statutory habeas counsel pursuant to *Rohan ex rel Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003). Respondents contend that Petitioner has not established a colorable *Rohan* claim and, therefore, is not entitled to an evidentiary hearing. Specifically, Respondents continue their previous argument that Petitioner has not established that it is necessary for him to communicate with his counsel in order for counsel to file a merits brief on his remaining claims. *(See* Dkt. 104 at 3-5.) The Court

did not clearly err in its implicit rejection of this argument. *(See* Dkt. 126.) Petitioner has established that some of his remaining claims could potentially benefit from his assistance to counsel. *(See* Dkt. 108 at 4-8.)

DISCUSSION

Motions for reconsideration are disfavored and appropriate only if the court is presented with newly discovered evidence, if there is an intervening change in controlling law, or if the court committed clear error. *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999) (per curiam); *see School Dist. No. 1J, Multnomah County, Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). Respondents do not allege any newly discovered evidence or submit that there has been an intervening change in the law. Rather, they assert that the Court committed clear error in finding a colorable basis for a *Rohan* claim because Petitioner did not demonstrate that his assistance was necessary for counsel to complete the merits briefing of his remaining claims. (Dkt. 127 at 1-2.)

The *Rohan* court sought to provide guidance to the district courts on this very issue. *Rohan*, 334 F.3d at 817-18. The *Rohan* court established a low threshold regarding the showing a petitioner must make for a court to determine that his assistance may potentially benefit counsel. *Id.* The *Rohan* court indicated, as follows: "requiring counsel to identify with particularity what petitioner would tell them were he competent, rather than the general areas where he could potentially assist, sets an unrealistically high bar under the circumstances.... Requiring an incompetent petitioner's counsel to identify

precisely what the petitioner would tell him were he able seems more likely to elicit the response, "Well if I knew that, I would not have to ask!" *Id.*

Counsel for Petitioner has identified claims where Petitioner potentially will provide beneficial assistance during briefing of the remaining issues. For instance, counsel identified Claim 9, Petitioner's claim of judicial bias, and counsel's need to understand any extra-record interactions between Petitioner and the trial judge which may have underlain the prosecutor acknowledging that sharp and contentious interactions had occurred between the judge and Petitioner during trial. (*See* Dkt. 108 at 5 citing RT 5/18/91 at 4.) In addition, counsel has identified other exhausted claims where extra-record information from Petitioner may provide beneficial assistance in the litigation of the remaining claims. (*Id.* at 6-8.) Given the low threshold established by *Rohan*, this Court did not clearly err in rejecting Respondents' argument that Petitioner could not potentially provide assistance in the litigation of his remaining claims.

Accordingly,

IT IS HEREBY ORDERED denying Respondents' motion for reconsideration. (Dkt. 127.)

DATED this 16th day of January, 2007.

/s/
Stephen M. McNamee
United States District Judge

APPENDIX C — EXCERPT OF TRANSCRIPT OF PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DATED OCTOBER 15, 2007

[1]UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ERNEST VALENCIA GONZALES,

Petitioner,

vs.

DORA B. SCHRIRO, et al.,

Respondents.

NO. CV 99-2016-PHX-SMM

Phoenix, Arizona
October 15, 2007
10:30 a.m.

EXCERPT OF TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE STEPHEN M. MCNAMEE

(Status Hearing)

Appendix C

* * * *

[10]The one other thing is I think while we were going to have this delay, that counsel should -- for Mr. Gonzales should be required to file an answer, a merits brief on their habeas. If there are some issues that they believe, and obviously there are some that they need Mr. Gonzales to answer, then in their merits response they should detail on those particular issues why it is that they need him.

As the Court's well aware, having ruled against me twice, it's the State's position -- well, there's two State's positions. The first State's position is that Rohan was wrongly decided. The second State position is that because post-AEDPA it's primarily a record habeas, that the habeas is on the record. As with an appeal, defendant has no right to be pro per.

This is, in a sense, an additional appeal past the direct appeal on constitutional issues that have been presented to the state court, have been litigated in state court, and the State's position still questions his need on any of those issues. But as to those issues where there's no dispute that he is needed, then rather than waste time, we should have those issues briefed on the merits.

* * * *

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DATED JUNE 10, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Ernest Valencia Gonzales,

Petitioner,

vs.

Dora B. Schriro, et al.,

Respondents.

No. CV-99-2016-PHX-SMM

DEATH PENALTY CASE

ORDER

Before the Court is Petitioner's Motion for Permission to Appeal and for Stay Pending Appeal. (Dkt. 189.) Respondents oppose the motion. (Dkts. 192.) Petitioner seeks permission to file an interlocutory appeal from the Court's order of April 23, 2008, denying his motion for a competency hearing. (Dkt. 187).

DISCUSSION

Background:

As Petitioner notes, the Court originally set an evidentiary hearing on Petitioner's motion for a competency determination pursuant to *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 819 (9th Cir. 2003),

which calls for a stay of habeas proceedings "where an incompetent capital habeas petitioner raises claims that could potentially benefit from his ability to communicate rationally." (Dkt. 131) The hearing was subsequently vacated when the Court granted Respondents' motion to transfer Petitioner to the Arizona State Hospital for further evaluation. (Dkt. 147.) Thereafter, the issue of forced medication arose when Petitioner withdrew from a regimen of anti-psychotic medication despite the apparently positive effects of that medication. (*See* Dkt. 164.) After status conferences on October 15 and December 3, 2007, the Court ordered additional briefing, including on the issue of *Rohan*'s applicability to Petitioner's properly-exhausted habeas claims.[1] (Dkt. 180.) Upon receiving the parties' briefs, the Court further reviewed the entire record, including all proceedings in state court and before this Court. Based upon its review of the record, the arguments of counsel, and the principles set forth in *Rohan*, the Court issued its order denying a competency hearing, finding that Petitioner's claims were legal and record-based and therefore could not potentially benefit from his ability to communicate rationally with counsel. (Dkt. 187.)

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1. In addition, on October 30, 2007, the Seventh Circuit issued its opinion in *Holmes v. Buss*, 506 F.3d 576 (7th Cir. 2007), which provided guidance on the application of the *Rohan* standard. In *Holmes*, the Seventh Circuit, proceeding on the assumption that *Rohan* was correctly decided, echoed the Ninth Circuit's distinction between claims that could potentially benefit from a habeas petitioner's input and those to which "a lay person has nothing to contribute." 506 F.3d at 579.

Appendix D

Analysis:

A district court has the authority under 28 U.S.C. § 1292(b) to certify an appeal from an interlocutory order in a civil case when the court is of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *See In re Cement Antitrust Litigation*, 673 F.2d 1020, 1025-26 (9th Cir. 1982). Certification should only be granted when the party seeking the appeal shows that exceptional circumstances exist such that an immediate appeal could save significant time and resources. *Id.* at 1026; *see Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978).

The Court concludes that its order of April 23, 2008, does not involve a controlling question of law and that an immediate appeal will not materially advance the termination of the litigation.

A question of law means a "pure question of law," not a mixed question of law and fact or an application of law to a particular set of facts. *See Ahrenholz v. Board of Trustees of the University of Illinois*, 219 F.3d 674, 675-77 (7th Cir. 2000). A question of law is one that "the court of appeals could decide quickly and cleanly without having to study the record." *Id.* at 677. Here, the controlling question of law was answered in *Rohan*, 334 F.3d at 819, in which the Ninth Circuit decided that a habeas proceeding must be stayed if the petitioner is not capable of rationally communicating with counsel on claims that may potentially benefit from his ability to do so.

Appendix D

In its order denying Petitioner's motion for a competency determination, this Court applied the holding in *Rohan* to the facts of Petitioner case and concluded that a stay of the proceedings to determine Petitioner's competency was not required. In addition, resolution of this issue on appeal is not controlling because it would not "materially affect the outcome of litigation in the district court." *In re Cement*, 673 F.2d at 1026. Whatever the result of an interlocutory appeal, the merits of Petitioner's habeas claims will remain to be litigated.

It is equally clear that an immediate appeal from the Court's order will not advance the ultimate termination of the litigation. If an interlocutory appeal were granted and the Ninth Circuit reversed the Court's order, it would do nothing to end the litigation of Petitioner's claims. If the Ninth Circuit affirmed the order, the interlocutory appeal would have delayed the ultimate termination of this case rather than advanced it.

Accordingly,

IT IS HEREBY ORDERED that Petitioner's Motion for Permission to Appeal and for Stay Pending Appeal (Dkt. 189) is **DENIED**.

DATED this 10th day of June, 2008.

/s/
Stephen M. McNamee
United States District Judge

REPLY BRIEF

BRIEFS

No. 10-930

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN, DIRECTOR, ARIONA DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

ERNEST VALENCIA GONZALES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF

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CONSTITUTIONAL PROVISIONS

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Contrary to Gonzales' position, the issue before the Court is a straight-forward narrow issue not governed by this Court's precedent or the Common Law. Without a legal basis, the Ninth Circuit has read into 18 U.S.C. § 3599(a)(2) rights for the capital habeas petitioner that frustrate the very purpose of habeas relief, needlessly obstruct the execution of lawful state-courts judgments, and further hinder timely federal review of state-court decisions.

Moreover, after Arizona filed its petition, this Court decided *Cullen v. Pinholster*, 563 U.S.___, 131 S. Ct. 1388 (decided April 4, 2011). The holding of *Pinholster* significantly undercuts the Ninth Circuit's rationale for injecting into § 3599(a)(2) a right of competency. In *Pinholster*, this Court expressly held that "review under [28 U.S.C. § 2254(d)(1)] is *limited to the record that was before the state court* that adjudicated the claim on the merits." *Id.* Slip. Op. p. 9 (emphasis added). Because "[s]ection 2254(b) requires that prisoners must ordinarily exhaust state remedies before filing for federal habeas relief," it is "contrary to that purpose to allow a petitioner to overcome an adverse state-court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively *de novo*." *Id.* pp. 9-10. Given that the federal habeas court's focus under § 2254(d)(1) is on "what a state court knew and did," the Ninth Circuit's decision that the habeas petitioner must be competent to assist counsel is meritless in light of *Pinholster*. *See id.* p.10.

Furthermore, Gonzales does not dispute that the Ninth Circuit decisions in *Rohan ex rel. Gates*, 334

F.3d 803 (9th Cir. 2002), *Nash v. Ryan*, 581 F.3d 1048 (9th Cir. 2009)[1], and the instant case relied on 18 U.S.C. § 3599(a)(2) as the statutory authority for these rights. (Br. Opp.[2] p. 31.) Further, Gonzales agrees, "the statute *fails to address [competency] altogether.*" (*Id.* pp. 25-26.) (emphasis added). He argues, nevertheless, that the Ninth Circuit was justified in reading this right of competency into the statute in the same manner that this Court found "a right to trial competency in the Sixth Amendment[.]" (*Id.* p. 26.) However, such an argument ignores the jurisprudential difference between this Court interpreting a trial right under the Constitution and a lower court applying a statute enacted by Congress.

Having acknowledged that the plain text of the statute does not provide for a capital habeas petitioner to be competent and to have his case stayed until he becomes competent, Gonzales argues that the case-law of this Court and the Common Law is consistent with Gonzales' right to be competent to assist his habeas attorneys. (Br. Opp. p.7, 11-13, 21-23.) He is mistaken. The cases he cites from this Court concern a different issue—the necessity of being competent in order *to end collateral review*, not any requirement that a habeas petitioner be competent *to proceed* in his quest for collateral relief. *See, e.g.*, *Rees v. Peyton*, 384 U.S. 312 (1966) (Memo), *Anderson v. Kentucky*, 371 U.S. 886 (1962). Once a competent petitioner waives

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[1] *Rohan*, 334 F.3d at 813 (implying from the predecessor to § 3599(a)(2) [21 U.S.C. § 848(q)(4)(B)] a right to competence); *Nash*, 581 F.3d at 1051-52 (same); *Gonzales*, Pet. Cert. App. p. A-5 (same).

[2] Br. Opp. refers to "Brief in Opposition."

further review, the federal court lacks jurisdiction to consider other issues no matter their merit. *See Gilmore v. Utah*, 429 U.S. 1012, 1016-17 (1976) (Burger, C.J., concurring); *cf. Lonchar v. Thomas*, 517 U.S 314, 317-18 (1996) (demonstrating the competency requirement to waive further collateral review). Here, Gonzales is not attempting to withdraw his habeas petition; rather he wants the opposite, to obtain relief. He is not attempting to waive any right. This Court's waiver cases do not establish that habeas petitioner must be competent to proceed with his case for relief.

Gonzales is also mistaken about the Common Law. The Common Law prior to the enactment of the Constitution did not provide any rights pursuant to a writ of habeas corpus in collateral review of state-court convictions. "It was not until 1867 that Congress made the writ generally available in 'all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.' [citation omitted] And it was not until well into [the 20th] century that this Court interpreted that provision to allow *a final judgment* of conviction in a state court to be collaterally attacked on habeas." *Felker v. Turpin*, 518 U.S. 651, 663 (1996) (emphasis added). "The writ of habeas corpus known to the Framers was quite different from that which exists today." *Id.* While the *Rohan* case has an extensive discussion of the Common Law, it identified no evidence that Congress intended to require habeas petitioners to be competent in order to pursue relief in federal court.

Gonzales contends that this case is not ripe

because he has not been found incompetent (Br. Opp. pp. 5-7). That contention misses the point. The issue is not whether Gonzales is competent; rather the issue is whether there is a requirement he be competent to proceed. Already the issue of Gonzales' competency has been in litigation for half a decade. *See* App A, at 1a (Gonzales' motion for competency determination dated February 23, 2006.) Apparently it matters not that Congress has never said that a capital habeas petitioner must be competent, nor has this Court. Gonzales would burden the States with the significant expense of litigation and further delay when, other than the Ninth Circuit's opinions, there is no basis in law to support such a requirement. Gonzales is simply wrong about this case not being ripe. These ersatz rights to competency and a stay are an impediment to the states' right to proceed with their judgments. The costs to the States are real as the case dockets demonstrate for this unnecessary litigation. (*See, e.g.*, Br. Opp. p. 27; *Amici Curiae* in support of the Pet. pp. 4-5 for cases litigating a right never authorized by Congress.)

Gonzales asserts there are no compelling reasons for review because this is simply an error-correction case that does not require intervention by this Court. However, judge-made law that contravenes the acknowledged intent of Congress and that harms the states, is a fundamental problem requiring this Court's intervention. One of Congress' chief purposes for enacting the AEDPA was to reduce the delays in capital cases on habeas review. *Rhines v. Weber*, 544 U.S. 269, 276 (2005); *Woodford v. Garceau*, 538 U.S. 202, 206 (2003). The error in the pre-AEDPA case of

Rohan is particularly egregious in the context of post-AEDPA review. The 1996 amendments to 28 U.S.C. § 2254 restricted the scope of federal habeas review in the interest of finality by substantially "constraining a federal court's power to disturb state-court convictions." *Miller-el v. Cockrell*, 537 U.S. (2003). The amendments "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685 (2002). The new highly deferential standard of review demands that state-court decisions "be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*).

In contrast to the narrowing of habeas review mandated by AEDPA, Ninth Circuit panels have extended the reach of *Rohan*. In *Nash*, Judges Richard Paez, Stephen Reinhardt and Sidney Thomas extended these rights to *an appeal* from the denial of a § 2254 petition, finding the inmate's ability to communicate rationally with counsel essential in a record-based appeal and stayed the appeal pending Nash's determination of competency. In *Gonzales*, Judges Stephen Reinhardt, Marsha Berzon and Milan Smith, stayed this case in an interlocutory appeal even though the district court found all the remaining claims were record-based or legal in nature. Pet. Cert. App. pp. A-1–A-6.

Gonzales contends that because the *Rohan* decision is narrow in scope and "coupled with the high burden of proof" the decision is beneficial. (Br. Opp.

p.29.) However, *Nash* and *Gonzales* decisions belie this contention. Moreover, the Ninth Circuit decisions are not benign. The cases Gonzales cites provide a snap-shot of how contagious these decisions can be. (*See* Br. Opp. pp. 19-20, 27, 29 n.9.)

In an effort to avoid review, Gonzales contends that his claims are not legal in nature or record-based—that the only issue is a mere factual dispute between the district and circuit courts. (Br. Opp. pp. 8-10.) The point is, however, 18 U.S.C. § 3599(a)(2), *does not require*—as Gonzales' acknowledges—the capital habeas petitioner be competent, hence the pre-*Pinholster* factual dispute concerning the need for petitioner's input is not material to the issue before this Court. Because Congress *has not* provided for a right to be competent in pursuing federal habeas relief, it matters not whether the claims are recorded based or not.

Gonzales claims Arizona "waived" the question "whether a stay based on incompetency is appropriate where the habeas petitioner's claims include *non-record-based claims*." (Br. Opp. p. 10, emphasis original.) Again Gonzales is mistaken. Given the Question Presented in the petition, it makes no difference whether the claims are record based—§ 3599(a)(2) does not provide a capital habeas petitioner a right to be competent in order to rationally communicate with counsel. Pet. Cert. at i.

Finally, the Seventh Circuit *Holmes* cases illustrate the logical fallacy in the course the Ninth Circuit charted. *See Holmes v. Levenhagen (Holmes*

II), 600 F.3d 756 (7th Cir. 2010); *Holmes v. Buss (Holmes I)*, 506 F.3d 576 (7th Cir. 2007). Because it is unethical to bring an action simply for delay, presumably a death row inmate pursues federal habeas because he has at least one arguably meritorious claim. Thus, as Judge Posner stated in *Holmes I* : "[I]t is odd to think that someone who initiates a proceeding can then freeze it by claiming to be mentally incompetent." 506 F.3d at 578. When years later, Holmes returned to the Seventh Circuit after being found incompetent and consigned to "habeas corpus limbo indefinitely," Judge Posner mused "[I]magine a capital defendant who has a slam-dunk habeas corpus claim that would not merely get him a new trial, but an acquittal; but because he is incompetent, he cannot communicate effectively with his lawyers or they with him." 600 F.3d at 762-63. "The implication is profoundly unsatisfactory." *Id.* at 762. Neither this Court nor Congress has mandated such a result. This Court should accept review to correct the Ninth Circuit misperception of the law.

CONCLUSION

For these reasons, the State respectfully requests that this Court accept Arizona's petition for a writ of certiorari.

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AMICUS CURIAE BRIEF

No. 10-930

In The Supreme Court of the United States

CHARLES L. RYAN, Warden
Arizona Department of Corrections,

Petitioner,

vs.

ERNEST VALENCIA GONZALES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF UTAH, DELAWARE, FLORIDA, GEORGIA, IDAHO, INDIANA, NEVADA, NEW MEXICO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, VIRGINIA, WASHINGTON, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

The rule adopted by the Ninth Circuit permits an indefinite, perhaps permanent, stay of execution of a death sentence even though no court has found the sentence to be unconstitutional. That rule undermines the *amici* States' compelling sovereign interests in the finality of their criminal judgments, their power to punish offenders, and their good faith efforts to enforce constitutional rights. *See, e.g., Harrington v. Richter*, No. 09-587, slip op. at *12 (Jan. 19, 2011).

While federal habeas review provides a legitimate "'guard against extreme malfunctions in the state criminal justice systems,'" it also "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Id.* (citations omitted). The States have a legitimate interest in ensuring that federal habeas review of a state death sentence intrudes on those significant interests only to the extent absolutely necessary to fulfill a federal court's limited role in reviewing a state judgment.[1]

---

[1] Counsel of record for all parties received notice at least ten days prior to the due date of the *amici curiae*'s intention to file this brief.

ARGUMENT

Through 18 U.S.C. § 3599(a)(2), Congress granted state inmates sentenced to death the right to federally funded counsel in their federal habeas proceedings. The Ninth Circuit has read into that provision another, additional right: the right to be competent to assist that federally funded habeas counsel. The Ninth Circuit did not purport to find that additional right in the text of § 3599(a)(2). Rather, it based the right on a purported "common law tradition" that "inform[s] [its] interpretation of the statutes Congress has enacted." *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 812-13 (9th Cir.), *cert. denied*, *Woodford v. Rohan*, 540 U.S. 1069 (2003). As the Warden explains in his petition, certiorari is warranted because the Ninth Circuit improperly rewrote the federal statute to create a new right that imposes severe burdens on the States' efforts to attain finality and execute their judgments. Those burdens are not limited to Arizona or the Ninth Circuit; the series of decisions culminating in the decision below have led to the needless delay of habeas proceedings nationwide. This Court's intervention is needed.

THE COURT SHOULD GRANT REVIEW BECAUSE UNCERTAINTY OVER WHETHER THERE IS A RIGHT TO BE COMPETENT TO PROCEED IN FEDERAL HABEAS REVIEW HAS GENERATED UNJUSTIFIED DELAY IN FEDERAL HABEAS LITIGATION ACROSS THE COUNTRY

The Ninth Circuit requires a federal district court to impose an indefinite stay of a federal habeas action if a petitioner is found to be incompetent to assist his attorneys. The Ninth Circuit initially limited its rule to situations where the petitioner's assistance in developing extra-record information is essential; that is, where his incompetence prevents him from "communicating [to his habeas counsel] information that he alone possesses." *Rohan*, 334 F.3d at 816. The court of appeals then expanded the rule to habeas appeals even though the appeal is "record-based." *Nash v. Ryan*, 581 F.3d 1048, 1050 (9th Cir. 2009). And in this case, the Ninth Circuit expanded the rule to federal district court proceedings even when the "claims are record-based or legal in nature." Pet. App. A.

The atextual, court-created *Rohan/Gonzales* rule prohibits a state from executing its judgment without requiring the petitioner to prove that it resulted from an "'extreme malfunction[ ] in the state criminal justice systems.'" *Richter*, slip op. at *12 (citations omitted). An indefinite or, potentially, permanent stay that enjoins a state from executing a death sentence that a petitioner never proves to be unconstitutional

unreasonably interferes with the States' interests in punishing their worst offenders.

In the Ninth Circuit, only the petitioner in *Rohan* has been deemed incompetent to continue litigating his federal habeas case. But the *Rohan* rule has prompted death-sentenced petitioners in the circuit to bring such claims, thereby substantially delaying the habeas proceedings while competency was determined.[2]

And while only the Ninth Circuit has recognized a right to be competent to assist counsel on federal habeas review, its rule affects more than the States in its jurisdiction. It has spawned competency litigation in other circuits. Those circuits have declined to resolve whether there is a right to be competent in federal habeas proceedings, instead dodging the predicate legal issue and focusing on whether a petitioner actually is competent. *Ferguson v. Sec.*

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[2] *See, e.g., In re Gonzales*, 2010 WL 4104722; *Nash*, 581 F.3d 1048; *Blair v. Cullen*, No. CV 99-6859, 2010 WL 5563896 (C.D. Cal. March 21, 2010), *report and recommendation adopted by Blair v. Cullen*, 2011 WL 91949 (C.D. Cal. Jan. 04, 2011); *Lewis v. Ayers*, No. CIV S-02-0013, 2010 WL 364504 (E.D. Cal. Jan. 26, 2010), *report and recommendation adopted by Lewis v. Ayers*, 2010 WL 3502667 (C.D. Cal. Sept. 2, 2010); *Rogers v. McDaniel*, No. 3:02-cv-0342, 2008 WL 820088 at *3 (D. Nev. March 24, 2008); *Hill v. Ayers*, No. 4-94-cv-641, 2008 WL 683422 (N.D. Cal. March 10, 2008). In one case, a death-sentenced petitioner relied on the *Rohan* right to be competent to ask to reopen his federal habeas action under Fed. R. Civ. P. 60(b). *Van Adams v. Schriro*, No. CV-04-1359, 2009 WL 89465 (D. Ariz. Jan. 14, 2009).

Dep't of Corrections, 580 F.3d 1183, 1222 (11th Cir. 2009), *cert. denied, Ferguson v. McNeil,* 130 S. Ct. 330 (2010); *Clayton v. Roper*, 515 F.3d 784, 790 n.2 (8th Cir.), *cert. denied,* 129 S. Ct. 507 (2008); *Holmes v. Buss*, 506 F.3d 576, 578-79 (7th Cir. 2007); *Mines v. Dretke*, No. 03-11137, 2004 WL 2913069 (5th Cir. Dec. 16, 2004).

But avoiding the predicate legal issue has resulted in significant delay across the country to litigate whether federal habeas petitioners are competent to assist their attorneys. That delay is, itself, an unjustified interference with the States' interests. Delay caused by litigating whether a federal habeas petitioner is competent to assist his habeas attorney is, of course, unwarranted if he has no right to be competent in the first place.

And experience teaches that the delay will be substantial. In Florida, for example, Ferguson relied on *Rohan* to challenge his competence to proceed. *Ferguson v. Dep't of Corrections*, No. 1:95-cv-00573 at doc. no. 58. The district court adopted the reasoning in *Rohan* and scheduled an evidentiary hearing on Ferguson's competence. *Id.* It took twenty months to resolve whether Ferguson was competent, which, in turn, postponed disposing of the second amended petition for approximately the same period. *Id.* at doc. nos. 57, 58, 107, 108. On appeal, the Eleventh Circuit declined to resolve whether the right to be competent existed on the strength of the district court's conclusion that Ferguson was in fact competent. *Ferguson*, 580 F.3d at 1222.

In *Clayton*, the Eighth Circuit likewise "assume[d], without deciding, that competency is required to proceed in a habeas proceeding. . . ." *Clayton*, 515 F.3d at 790 n.2. It affirmed the district court's conclusion that Clayton was competent to proceed. But the litigation about whether Clayton was in fact competent spanned over two years from the date the district court ordered a competency evaluation. *Clayton v. Luebbers*, No. 4:02-cv-08001, doc. nos. 79 and 104. It included a seven-month sojourn at the United States Medical Center for Federal Prisoners. *Clayton*, 515 F.3d at 789. The evaluator took ten months from the order for an evaluation to issue her report. *Clayton*, No. 4:02-cv-08001, doc. nos. 79 and 104. Clayton took another five months to renew his motion for a stay based on his alleged incompetence to proceed with his habeas petition. *Id.* at doc. nos. 93 and 104.

In *Dansby v. Norris*, No. 02-04141, 2009 WL 485418 (W.D. Ark. Feb. 26, 2009), a district court in the Eighth Circuit, citing *Clayton*, "assume[d] that competency is required, without answering whether an inmate must be competent to proceed in a habeas action." *Id.* at *2. That was nearly two years ago. Although the district court scheduled an evidentiary hearing on the competency issue for April 2011, Dansby has moved to continue that date. *Dansby v. Norris*, No. 4:02-cv-04141, doc. nos. 140 and 167. Because the issue of whether a petitioner has a right to be competent remains unresolved, the merits of Dansby's habeas claims remain in limbo while the

parties continue to litigate whether he is in fact competent.

The *Rohan* issue also has arisen in the District of Utah. Death row inmate Ronald Lafferty asked the federal district court to stay his habeas action because, according to him, he is incompetent to proceed. He filed the motion two and one-half years after the federal court appointed counsel to represent him and nineteen months after he had filed and twice amended his habeas petition. *Lafferty v. Turley*, No. 2:07-cv-00322, doc. nos. 3, 24, 39, 42, 89. In its opposition, the State argued that Lafferty had no right to be competent. *Id.* at doc. no. 93. The district court granted a stay pending the resolution of Lafferty's motion for a competency determination. *Id.* at doc. no. 104. As a result of the competency litigation in *Lafferty*, nothing has been filed on the merits of his challenges to his conviction and sentence since the State responded to his petition nearly two years ago. *Id.* at doc. no. 69.

In *Holmes v. Buss*, the Seventh Circuit likewise assumed, without deciding, that Holmes had a right to be competent in federal habeas proceedings. *Holmes v. Buss*, 506 F.3d at 578.[3] But further evidentiary development convinced the Seventh Circuit that Holmes was incompetent. *Holmes v. Levenhagen*, 600 F.3d 756 (7th Cir. 2010). It then ordered the district court "to suspend the habeas corpus proceeding

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[3] The Seventh Circuit declined to decide whether *Rohan* was correct because the state did not challenge it.

unless and until the state provides substantial new evidence that Holmes's psychiatric illness has abated, or its symptoms are sufficiently controlled, to justify the resumption of the proceeding." *Id.* at 763. Thus, the Seventh Circuit has stayed Holmes' habeas case indefinitely and, with it, the execution of the death sentence he has never proven is unconstitutional. It did so to secure a right that it assumed, but never decided, that Holmes had.

The Seventh Circuit even went so far as to condone raising a competency challenge as a tactic to delay execution by way of a stay in federal habeas review: "the tactical question whether to plead incompetence and if one prevails perhaps remain on death row for the rest of one's life, or to press for a new trial even at the risk of another conviction and another death sentence, becomes all-important." *Id.* at 759. The court therefore concluded that, if a petitioner has a right to be competent to assist counsel on federal habeas review, he must be competent to make that determination. *Id.* at 762-63 (noting it would be unsatisfactory to allow a next friend to make that determination for the petitioner).

Until this Court resolves whether there is a right to be competent to assist federally funded counsel on federal habeas review, capital petitioners across the nation will continue to raise the issue. Unlike any other habeas petitioner, a death-sentenced petitioner has every reason to find ways to postpone a federal court's decision on whether his sentence resulted from an "extreme malfunction" in state processes. If he

loses, his sentence will be carried out sooner. Even if he wins, he may be retried and resentenced to death. But an indefinite stay will postpone the merits inquiry, possibly forever.

This Court recognized this problem when it limited the availability of stays in federal habeas actions while a petitioner returns to state court to exhaust his federal claims. *See Rhines v. Weber*, 544 U.S. 269, 277-78 (2005) (recognizing that capital defendants may deliberately engage in dilatory tactics to "prolong their incarceration and avoid execution of the sentence of death"). Competency litigation provides another avenue for delay. The petitioner has nothing to lose by raising the issue regardless of how frivolous it may be. If he succeeds, he may avoid execution until his competence to assist habeas counsel is restored. If his competence is never determined to be restored, he may avoid execution forever without ever proving that his sentence was unconstitutional (or that he is incompetent to be executed under the standard of *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986)). Even if he does not succeed in procuring a stay, the additional delay generated by litigating his competence will "prolong [his] incarceration and avoid execution of [his death] sentence" at least for the period of that litigation. *See Rhines*, 544 U.S. at 277-78. This is precisely the kind of interference in state criminal justice processes that federal stays should avoid.

In sum, any time a federal court delays its review of a state judgment it necessarily infringes on a state's interest in carrying out that judgment. Where the delay does not further the legitimate federal interest in correcting extreme malfunctions in state judicial systems that result in constitutional violations, it is an unreasonable incursion in the states' compelling interests. These delays are particularly unacceptable because the basis for them is a series of Ninth Circuit decisions that improperly read a right to competency in habeas proceedings into a federal statute that provides nothing of the sort. This Court's intervention is needed to ensure that 18 U.S.C. § 3599(a)(2) is confined to its terms – the provision of counsel to death-sentenced inmates – and is no longer improperly used by courts as the basis for a right to competency that unduly delays habeas proceedings in capital cases.

CONCLUSION

For the reasons argued, the Court should grant the petition for a writ of certiorari.

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PETITIONER'S BRIEF

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No. 10-930

In The Supreme Court of the United States

CHARLES L. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

ERNEST VALENCIA GONZALES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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CAPITAL CASE
(NO EXECUTION DATE SET)
QUESTION PRESENTED

Did the Ninth Circuit err when it held that 18 U.S.C. 3599(a)(2) – which provides that an indigent capital state inmate pursuing federal habeas relief "shall be entitled to the appointment of one or more attorneys" – impliedly entitles a death row inmate to stay the federal habeas proceedings he initiated if he is not competent to assist counsel?

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STATEMENT OF JURISDICTION

The Ninth Circuit entered judgment on October 20, 2010. The Director of the Arizona Department of Corrections filed his petition for writ of certiorari on January 18, 2011, invoking this Court's jurisdiction under 28 U.S.C. 1254(1). This Court granted the petition on March 19, 2012.

STATUTORY PROVISIONS

The entire provisions of 18 U.S.C. 3599 are set forth in the last appendix of the petition for certiorari, Appendix J. The relevant part on which the Ninth Circuit relied, 18 U.S.C. 3599(a)(2), provides:

> In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

INTRODUCTION

Arizona death-row inmate Ernest Valencia Gonzales filed his first petition for a writ of federal habeas corpus in November 1999, effectively staying his execution. Pet. App. I1. The merits of his claims for relief have yet to be decided. Rather, for the last five years the parties have litigated whether Gonzales is competent to assist his habeas counsel in preparing his merits brief in district court. The Ninth Circuit has indefinitely stayed Gonzales's federal habeas proceeding because of Gonzales's alleged inability to assist counsel with a "judicial bias" claim notwithstanding a finding by the district court that

Gonzales's "properly-exhausted claims (including his judicial bias claim) are record-based and/or resolvable as a matter of law." Pet. App. C27-28.

The delay to assess Gonzales's competency resulted from the Ninth Circuit's application of its prior decisions in *Rohan v. Woodford*, 334 F.3d 803 (9th Cir.), *cert. denied*, 540 U.S. 1069 (2003), and *Ryan v. Nash*, 581 F.3d 1048 (9th Cir. 2009), *cert. dismissed*, 130 S. Ct. 1757 (2010)[1] In *Rohan*, the court found that a federal habeas petitioner must be competent to assist counsel in capital habeas proceedings brought under 28 U.S.C. 2254. 334 F.3d at 817-19. Unique among the federal courts of appeals, the Ninth Circuit found that, because 21 U.S.C. 848(q)(4)(b) provided for the appointment of counsel for any indigent federal habeas petitioner seeking to vacate or set aside a death sentence, the statute created a concomitant right to be competent to assist counsel. In *Nash*, the court found a similar requirement, under 18 U.S.C. 3599(a)(2), that an inmate must be competent to assist counsel in a record-based appeal from the denial of federal habeas relief.[2] 581 F.3d at 1055.

The indefinite stay imposed by the Ninth Circuit thwarts the State of Arizona's interest in the finality

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[1] Viva Leroy Nash died while the State of Arizona's petition for certiorari review was pending.

[2] Congress recodified Section 848(q)(4)(b) in 2005, without material change, at Section 3599(a)(2). Terrorist Death Penalty Enhancement Act of 2005, Pub. L. No. 109-177, § 222(a), 120 Stat. 231 (2006).

of its criminal convictions. Contrary to the Ninth Circuit's conclusion, Section 3599(a)(2) does not create a right to competency to assist counsel. The Ninth Circuit's ruling conflicts with this Court's "next-friend" and competency-to-be-executed jurisprudence and cannot be reconciled with limitations placed on federal habeas corpus review by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), as codified in 28 U.S.C. 2254.

STATEMENT OF THE CASE

On February 20, 1990, Gonzales stabbed Darrel Wagner to death and severely injured Deborah Wagner after the couple arrived home from dinner to find Gonzales burglarizing their home. *State v. Gonzales*, 892 P.2d 838, 842 (Ariz. 1995). Jurors convicted Gonzales of murder and aggravated assault, among other felonies. *Id.* Gonzales received a death sentence for murdering Darrel Wagner. *Id.*

Gonzales raised several issues on direct appeal, including a claim of judicial bias at trial and sentencing. *Id.* at 843. The Arizona Supreme Court rejected all of Gonzales's claims and affirmed his convictions and sentences, including his death sentence. *Id.* at 843, 847-48. This Court denied certiorari. *Gonzales v. Arizona*, 516 U.S. 1052 (1996).

Gonzales subsequently pursued post-conviction relief in state court. Among other claims, Gonzales

again asserted that judicial bias during trial and sentencing denied him a fair trial. The trial court and the Arizona Supreme Court denied relief. Pet. App. B3.

After filing his initial federal habeas corpus petition in November 1999, Gonzales filed a 237-page amended petition raising 60 claims for federal relief. Pet. App. B3. In 2001, Gonzales returned to state court to pursue a second, successive state-court petition for post-conviction relief. *Id.* The state trial court denied the petition, and the Arizona Supreme Court denied a petition for review from that decision. Pet. App. B3-B4.

In January 2006, the district court decided the procedural status of Gonzales's claims and thereafter gave the parties an opportunity to provide updated legal citations and arguments regarding Gonzales's properly exhausted claims. Pet. App. B5. On the eve of the court's deadline for Gonzales's opening merits brief, his counsel filed a *Rohan* motion for a competency determination and a stay. *Id.* Gonzales's attorneys asserted that "due to a progressive deterioration in [Gonzales's] mental health he had lost the ability to rationally communicate with his counsel and assist them," and that his assistance was "essential" to a number of the exhausted habeas claims. *Id.* at A3.

Given these representations, the district court directed the parties to have mental health experts examine Gonzales. *Id.* at C3. After two psychiatrists reached conflicting conclusions regarding Gonzales's competency, he was transferred to the Arizona State

Hospital for an extended mental health assessment. *Id.* at C4, C5. At the end of the assessment period, the supervising psychologist submitted a final report indicating continuing reservations "concerning the veracity of Mr. Gonzales's symptoms" and stating that "malingering cannot be ruled out." *Id.* (quoting the report). The supervising psychologist was ultimately persuaded, however, that Gonzales's symptoms were genuine after observing improvement when Gonzales was treated with antipsychotic medication. Despite this apparent improvement, the medication was stopped at Gonzales's request after he complained of back pain and restlessness. *Id.*

Following further briefing, including pleadings in which Gonzales asserted that, under *Sell v. United States*, 539 U.S. 166 (2003), he should not be forcibly medicated to restore competency, the district court ordered merits briefing on Gonzales's pending claims. *Id.* at C29. In rejecting Gonzales's counsel's assertion that Gonzales's input was necessary to develop his judicial-bias claim, the district court relied on the following facts: 1) Gonzales's first trial ended in a hung jury. *Id.* at C10. Acting *pro se*, prior to the retrial, Gonzales claimed, based on adverse rulings and the trial judge's on-the-record comments, that the judge was biased against him. *Id.* 2) Gonzales's motion to disqualify the trial judge was heard by a different judge, who denied it. *Id.* at C10-C12. 3) After his conviction in the second trial, and prior to sentencing, Gonzales again filed a *pro se* motion seeking to disqualify the trial judge. *Id.* at C12. Once again a

different judge heard and denied the motion. *Id.* 4) On direct appeal, Gonzales's counsel raised a claim of judicial bias, which the Arizona Supreme Court denied on the merits. *Id.* at C12-13. The district court found that the fully-developed record in the case and controlling authority precluding further factual development in federal court made Gonzales's personal knowledge unnecessary to resolve the claim. *Id.* at C15-16.

Gonzales's attorneys filed an emergency petition for writ of mandamus and an emergency motion for stay of the district court's proceedings. *Id.* at C29, D1, E1. On January 5, 2009, the Ninth Circuit stayed the district court proceedings. *Id.* at H1-H2. Ten months later, the Ninth Circuit issued its opinion, concluding as follows:

> *Nash* squarely controls this case, foreclosing the district court's conclusion that a stay under *Rohan* is categorically unavailable when a capital habeas petitioner's claims consist only of record-based or legal questions. [citing *Nash*, 581 F.3d at 1050] . . . Thus, no less than Nash's claim of ineffective assistance of counsel, Gonzales's judicial bias claim could potentially benefit from the "first-hand insight into the earlier proceedings" that a competent petitioner would be able to provide.

> *Nash* thus compels the conclusion that Gonzales has raised at least one claim that could potentially benefit from rational communication with counsel and that he is accordingly eligible for a stay under *Rohan*.

Pet. App. A5-A6 (citing *Nash*, at 1056).

SUMMARY OF ARGUMENT

Indefinitely staying federal habeas corpus proceedings based on the habeas corpus petitioner's incompetence to assist counsel contravenes the States' interest in the finality of their criminal convictions. The Ninth Circuit has improperly stayed Gonzales's federal habeas proceedings, as well as his execution, notwithstanding the district court's reasoned conclusion that Gonzales's pending claims do not require further factual development and do not require further input from Gonzales.

The Constitution does not provide a right to be competent to assist counsel on federal habeas corpus review. The Ninth Circuit has nevertheless concluded that Congress gave death row inmates a statutory right to be competent to assist habeas corpus counsel and has extended that right to cases involving only a record-based review of legal questions.

The statute that the Ninth Circuit interpreted as creating a right to competency, 18 U.S.C. 3599(a)(2), does not provide such a right. Section 3599(a)(2) provides for the appointment of counsel for indigent

federal habeas corpus petitioners but does not address or otherwise provide for the inmate's competence. No reasoned basis supports the Ninth Circuit's conclusion that Congress impliedly intended that death penalty habeas appeals could be stayed indefinitely based on the inmate's alleged inability to assist counsel.

The Ninth Circuit's interpretation of Section 3599(a)(2) directly conflicts with this Court's "next-friend" jurisprudence, which expressly recognizes that habeas cases can proceed notwithstanding the mental incapacity of petitioners. *See Whitmore v. Arkansas*, 495 U.S. 149, 165 (1990). The Ninth Circuit's interpretation also conflicts with *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986), which imposes a standard for competency to be executed that requires only that the inmate understand he is being punished and why. Finally, the Ninth Circuit's rationale cannot be reconciled with Congressional intent as evidenced by AEDPA, which was enacted to reduce delay in capital cases and to mandate greater deference to state court decisions.

ARGUMENT

I. 18 U.S.C. 3599(A)(2) DOES NOT REQUIRE THAT AN INDIGENT FEDERAL HABEAS CORPUS PETITIONER BE COMPETENT TO ASSIST COUNSEL.

Recognizing the Constitution does not establish a right to be competent to assist counsel, the Ninth

Circuit incorrectly interpreted 18 U.S.C. 3599(a)(2) as creating a right to competently assist statutorily-appointed counsel. Nothing in the text of the statute, however, supports that interpretation. Section 3599(a)(2) states only that "[i]n any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f)."

Section 3599(a)(2) does not reference competency. Indeed, the only reference to "competency" in Section 3599 is in subsection (e), which provides as follows:

> [E]ach attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such *competency* proceedings and proceedings for executive or other clemency as may be available to the defendant.

(Emphasis added.)

The fact that Congress referenced counsel's role in competency proceedings in subsection (e) demonstrates that representation does not depend upon the habeas petitioner's competence. Congress cannot have intended to authorize counsel to represent an inmate in post-conviction competency proceedings only if the inmate is competent to assist counsel.

Lacking textual support, the Ninth Circuit relied in *Rohan* on "common law tradition" for reading a competency requirement into subsection (a). *See* 334 F.3d at 812-13 ("Congress has not explicitly required competence in federal habeas proceedings, but the common law tradition underlying the right to competence and its great practical significance in this context inform our interpretation of the statutes Congress has enacted."). However, a court's "task is to apply the text, not improve upon it." *Harbison v. Bell*, 556 U.S. 180, 198-99 (2009) (quoting *Pavelic & LeFlore v. Marvel Entertainment Group, Div. of Cadence Industries Corp.*, 493 U.S. 120, 126 (1989)). This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations and internal quotation marks omitted). Thus, "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Id.* Because Section 3599 does not, by its terms, create a right to competency to assist counsel, that should end the inquiry.

II. THE NINTH CIRCUIT'S JUSTIFICATIONS FOR ITS RULE DO NOT WITHSTAND SCRUTINY.

The Ninth Circuit's reliance (in *Rohan*) on common-law concepts of competency during and after trial is unpersuasive. Historically, the right to counsel has not been equated to a right to competency. While the trial right to counsel is found in the text of the Sixth Amendment, the right to competency at a criminal trial is derived from the Fourteenth Amendment's Due Process Clause. *Compare Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963) (announcing a Sixth Amendment right to counsel at trial) with *Pate v. Robinson*, 383 U.S. 375, 385 (1966) (a defendant is deprived of due process if state procedures are inadequate to protect against being tried or convicted while incompetent).

The ability to collaterally attack a state-court judgment in federal court has no deep common-law roots or settled tradition. *See Kuhlmann v. Wilson*, 477 U.S. 436, 446-47 (1986) (plurality opinion) (detailing the history of federal habeas review). Likewise, there are no deep common-law roots relating to *post-conviction* competency to assist counsel. In fact, this Court has declined to apply the common-law concept of trial competency in determining post-trial competency to be executed. *See Ford*, 477 U.S. at 422, n.3 (Powell, J., concurring in part and concurring in the judgment) (noting that the prevailing test in the States did not require competence to assist counsel as a prerequisite to carrying out a death sentence).

Thus, the Ninth Circuit's reliance on "common law" is misplaced.

Furthermore, regardless of common law relating to the right to counsel and the right to competency, "[s]tatutes should be interpreted consistently with the common law" only if the "statute . . . clearly covers a field formerly governed by the common law." *Samatar v. Yousuf*, 130 S. Ct. 2278, 2289 (2010). Here, a right-to-counsel statute and a common law right to competency cover different fields and Congress gave no indication that by guaranteeing a right to post-conviction counsel, it intended to occupy the field in the area of competency as well.

In *Rohan*, the Ninth Circuit also relied on *Rees v. Peyton*, 384 U.S. 312 (1996) (per curiam), as "support[ing]" its interpretation of Section 3599(a). *Rohan*, 334 F.3d at 815. *Rees*, however, involved a death row inmate's request to *withdraw* his federal habeas petition and forgo any further legal proceedings. After Rees's counsel advised the Court that he could not conscientiously accede to Rees's instructions because of Rees's alleged incompetence, this Court ordered the district court to determine whether Rees had "capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation." *Id.* at 313.

Because *Rees* did not involve competency to litigate a federal habeas petition, but rather competency to withdraw a certiorari petition, its reasoning is inapplicable. A limited stay to assess competency

to withdraw is reasonable to move a case forward because, if the inmate is found competent, it will obviate the need for further proceedings. In contrast, a stay to assess competency to assist counsel will not move a case forward. Thus, unless an inmate's input is essential to further the federal habeas corpus litigation, it is unreasonable to stay the proceedings.

The Ninth Circuit's conclusion that client input is essential in briefing record-based claims is similarly unpersuasive. In the appellate context, this Court has emphasized "the superior ability of trained counsel in the examination into the record, research of the law, and marshalling arguments on [the appellant's] behalf." *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (quoting *Douglas v. California*, 372 U.S. 353, 358 (1963)). An inmate's input will not change the record from which counsel must base his or her arguments. Thus, the Ninth Circuit's finding in *Nash* that the inmate's input was essential to the preparation of his Ninth Circuit appellate brief is unsupportable.

So too, in the instant case, Gonzales's input is not essential to the preparation of his district court merits brief. Under AEDPA, Gonzales's merits briefing is limited to properly exhausted claims. *See Rose v. Lundy*, 455 U.S. 509 (1982) (federal habeas corpus proceedings are limited to consideration of claims that have already been presented and exhausted in state court proceedings); *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999) (state court is first forum to review claims and provide relief). And, under *Cullen v. Pinholster*, 563 U.S. ___, 131 S. Ct. 1388, 1398

(2011), review of claims (such as Gonzales's judicial bias claim) that have been addressed on the merits in state court is limited to the record considered by the state court:

> Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that "resulted in" a decision that was contrary to, or "involved" an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time *i.e.*, the record before the state court.

131 S. Ct. at 1398. Because review of Gonzales's judicial-bias claim (as well as his other claims) is limited to the record developed in state court, the Ninth Circuit's conclusion that Gonzales's input is essential does not withstand scrutiny.

Finally, accepting the Ninth Circuit's reading of Section 3599 would result in disparate treatment of indigent and non-indigent defendants. Section 3599 applies only to indigent defendants. There is no corresponding provision relating to non-indigent defendants that would impliedly create a right to be competent to assist counsel. As a consequence, the Ninth Circuit's approach compels the unjustifiable result that indigent and non-indigent death-row prisoners have different rights to be competent to assist counsel.

III. THE NINTH CIRCUIT'S RULE IS INCONSISTENT WITH THIS COURT'S NEXT-FRIEND JURISPRUDENCE.

This Court has never required lower courts to stay a habeas corpus petitioner's claims pending a finding of competency to consult with counsel. Rather, it has held that, if a petitioner is unable to litigate his own claims because of mental incapacity, a "next-friend" may pursue the litigation on his behalf. *See Whitmore*, 495 U.S. at 165. Congress codified that approach in 28 U.S.C. 2242, which allows a habeas petition to be filed "by someone acting" on behalf of the applicant. Thus, counsel and competence do not go hand in hand.

"Next-friend" standing under *Whitmore* is a well-established practice. *See, e.g., People v. Kelly*, 822 P.2d 385, 413 (Cal. 1992) (applying *Whitmore* and noting that an attorney representing a defendant can serve the same function as a "next-friend"); *Commonwealth v. Haag*, 809 A.2d 271, 278 (Pa. 2002) ("Through a series of cases, which relied upon the reasoning of *Whitmore*, we recognized that our law permits a next-friend to bring a [post-conviction] action on behalf of a prisoner."). To the extent Gonzales has a viable claim for relief based on the existing state-court record, a stay delays relief he could otherwise obtain if counsel, acting essentially as a "next-friend," briefs the issues raised in Gonzales's pending federal habeas corpus petition. To the extent the existing record does not provide a basis for federal relief, however, the State of Arizona and Gonzales's

crime victims are denied finality based solely on speculation that Gonzales is better situated than counsel to divine arguments that might justify relief.

IV. THE NINTH CIRCUIT'S RULE CONTRAVENES THIS COURT'S CASE LAW REGARDING COMPETENCY TO BE EXECUTED.

This Court has limited a capital prisoner's right to competency in post-conviction proceedings to an Eighth Amendment prohibition against "carrying out a sentence of death upon a prisoner who is insane." *Panetti v. Quarterman*, 551 U.S. 930, 934 (2007) (quoting *Ford*, 477 U.S. at 409-10). Generally, this claim does not become ripe until after the first habeas corpus petition has been resolved. *See Panetti*, 551 U.S. at 947. The standard for competency to be executed requires only that the prisoner be aware "of the punishment [he is] about to suffer and why [he is] to suffer it," not that he be able to assist in his own defense. 477 U.S. at 422 & n.3. (Powell, J., concurring in part and concurring in the judgment); *see Panetti*, 551 U.S. at 949 (stating that Justice Powell's concurrence in *Ford* is the controlling opinion).

The Ninth Circuit's rulings in *Rohan*, *Nash*, and the instant case negate the *Ford* standard. There is no need to reach the *Ford* standard if an inmate can indefinitely stay his execution on the basis of a

standard that requires a higher degree of competency, *i.e.*, competence to assist counsel.

Had Congress intended for Section 3599 to create not only a right to counsel, but to also preempt or supersede this Court's competency-to-be-executed jurisprudence, it would have said so expressly. Congress gave no indication that, by guaranteeing a right to federal habeas counsel, it intended to occupy the field in the area of competency.

V. THE NINTH CIRCUIT'S RULE CONFLICTS WITH CONGRESSIONAL INTENT AS EVIDENCED BY AEDPA.

In enacting AEDPA changes to 28 U.S.C. 2254, Congress limited the power of a federal court to grant an application for a writ of habeas corpus on behalf of a state prisoner. *Pinholster*, 131 S. Ct. at 1398; *see also Harrington v. Richter*, 562 U.S. ___, 131 S. Ct. 770, 786 (2011); *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*). To obtain relief under AEDPA, an inmate must establish that state court resolution of his claims were "contrary to" or "an unreasonable application of" this court's precedents, or were "based on an unreasonable determination of the facts . . . in light of the evidence presented in the State court proceedings." 28 U.S.C. 2254(d)(1)-(2). And, as noted previously, under AEDPA, federal review of claims addressed on the merits in state court is limited to the record before the state court. *Pinholster*, 131 S. Ct. at 1398.

One of AEDPA's central purposes is to reduce delay in capital cases on habeas review. *Schriro v. Landrigan*, 550 U.S. 465, 475 (2007); *Rhines v. Weber*, 544 U.S. 269, 276 (2005); *Woodford v. Garceau*, 538 U.S. 202, 206 (2003); *see also* 18 U.S.C. 3771(b) (recognizing a victim's independent right to be free from unreasonable delay in a federal habeas proceeding). An indeterminate stay pending restoration of competency to assist counsel is thus inconsistent with AEDPA. *Rhines*, 544 U.S. at 276.

This Court has noted that, although district courts retain authority to issue stays of habeas proceedings, AEDPA "circumscribe[s]" that authority. *Id.* A decision to stay a habeas proceeding "must . . . be compatible with AEDPA's purposes." *Id.*

This Court has further noted that "not all petitioners have an incentive to obtain federal relief as quickly as possible. In particular, capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the death sentence." *Id.* at 277-78.

The Ninth Circuit's rule permits just such tactics. After initiating federal habeas proceedings, an inmate need only demonstrate an inability to assist counsel to stay those proceedings, as well as his execution, at least as long as it takes to conduct competency proceedings and perhaps indefinitely if the inmate is found to be incompetent to assist counsel.

A stay based on speculation that an inmate might have information that he is currently unable to share with counsel is illogical and is clearly incompatible with AEDPA. If, prior to becoming incompetent to assist counsel, the inmate has not communicated information that establishes a colorable claim for relief in his federal habeas corpus proceeding, the evidence remains the same as when state court proceedings concluded. Thus, there is no reasoned basis for staying the inmate's death sentence.

Mere speculation does not create a colorable claim. If, for example, a testifying witness dies after trial without having ever indicated that the testimony provided at trial was inaccurate, it would be illogical to stay federal habeas corpus proceedings on the basis that the testifying witness might have changed his or her testimony had he or she been given an opportunity to do so in federal court. It is similarly illogical to stay federal habeas corpus proceedings based solely on speculation that the petitioning inmate might remember something new if given an opportunity to do so.

Some rare circumstances might justify a federal district court's *limited* stay based on the inmate's alleged incompetence. For example, in cases involving an assertion of actual innocence, a stay of federal habeas corpus proceedings could potentially prevent a clear and grave miscarriage of justice absent an

available state court remedy.[3] *See House v. Bell*, 547 U.S. 518, 537-38 (2006); *Schlup v. Delo*, 513 U.S. 298, 327, 331-32 (1995); 28 U.S.C. 2244(b)(2)(B). It is difficult, however, to hypothesize any other type of claim that would warrant a stay based on the inmate's alleged incompetence given AEDPA's restrictions on the types of claims and the type of evidence that can be presented on federal collateral review. A federal court's authority to issue a stay based on alleged incompetence to assist counsel should therefore be limited to cases where the petitioner's personal knowledge is essential to establishing actual innocence, or where a stay may serve to advance, rather than indefinitely delay, the proceedings, as in a case in which an inmate attempts to withdraw his federal habeas corpus petition.

CONCLUSION

This Court should reject the Ninth Circuit's interpretation of Section 3599 and find that an inmate's competency to assist counsel is not required to carry out the limited review available under AEDPA, particularly when the claims at issue are record-based and no further evidentiary development is permitted. Accordingly, this Court should lift the

[3] In Arizona, a prisoner can raise claims of actual innocence at any time in state post-conviction relief proceedings without regard to the rules of preclusion. *See* Ariz. R. Crim. P. 32.1(h).

emergency stay imposed by the Ninth Circuit and remand the case to the district court to resolve Gonzales's claims on the merits.

Respectfully submitted,

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RESPONDENT'S BRIEF

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IN THE

Supreme Court of the United States

CHARLES L. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

ERNEST VALENCIA GONZALES,

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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CAPITAL CASE

QUESTION PRESENTED

Whether a district court has authority to stay capital habeas proceedings when a stay is deemed essential to ensure a capital habeas petitioner's ability to communicate with and assist his or her counsel, given that 28 U.S.C. § 2251 expressly confers that authority and 18 U.S.C. § 3599 guarantees a capital habeas petitioner's right to appointed counsel.

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4 William Blackstone, Commentaries *24-25 (1769) 17
American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913 (2003) 26
American Bar Association, Model Code of Prof'l Conduct R. 1.4 (Communication) 26
Gary B. Melton, et. al., *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers* (2d ed. 1997) 33
L. Elizabeth Chamblee, *Time for a Legislative Change: Florida's Stagnant Standard Governing Competency for Execution*, 31 Fla. St. U.L. Rev. 335 (2004) 33

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Report by U.S. Justice Dep't Bureau of Justice Statistics, "Capital Punishment 2010: Statistical Tables" (Dec. 20, 2011).. 32

Richard Rogers, *Clinical Assessment of Malingering and Deception* (2d ed. 1997) 33

INTRODUCTION

District courts have long held the authority, by statute and at common law, to stay proceedings on a pending petition for writ of habeas corpus, as well as related state judgments of sentence, to ensure the integrity of those proceedings and enable full and fair presentation of claims. Capital habeas petitioners likewise have long enjoyed an "enhanced" right to counsel, see *Martel* v. *Clair*, 132 S. Ct. 1276, 1284 (2012), which guarantees not only a right to an assigned attorney but also "necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims," *McFarland* v. *Scott*, 512 U.S. 849, 858 (1994).

The standard applied by the court of appeals in this case — that a stay of habeas proceedings is proper when a capital habeas petitioner's incompetence renders him or her incapable of essential communication with counsel — is a natural byproduct of these settled principles. It leaves discretion to enter a temporary stay with the district court, where it belongs, see *McFarland*, 512 U.S. at 858, and does not unduly hasten the incompetent habeas petitioner's death sentence when communication with counsel is vital to the presentation of his or her claims. Contrary to the characterization of Petitioner (hereafter "the State"), this limited and narrow standard is neither alarming nor revolutionary; it simply makes sense.

It is the State's proposed restriction that would work a radical restructuring of traditional habeas practice. That rule would broadly prohibit a district court from ever staying habeas proceedings, notwithstanding the court's determination that a stay is warranted to ensure the capital habeas petitioner's

right to counsel. Under the State's proposed rule, merely because a claim may be deemed "record-based" or "legal in nature" or because a "next friend" might be appointed, the district court is categorically barred from exercising its discretion to issue a stay. There is no support, either in federal statutes or elsewhere, for these proposed restrictions, and they would in any event be wholly unworkable in application. Even if the State believes (without apparent reason) that constraining a district court's discretion in this manner would somehow "improve upon" habeas practice, Pet. Br. 11, neither federal habeas law nor this Court's precedent contemplate or permit such restrictions.

Free from the distractions, this is a simple case. The court of appeals set forth the proper standard for whether a stay of habeas proceedings is warranted: when a capital habeas petitioner's incompetence precludes communication with counsel that is "*essential* to counsel's ability to meaningfully prosecute a capital habeas claim." Pet. App. A5 (emphasis added, internal quotation marks omitted). The court of appeals correctly applied that standard to find that a temporary stay (pending competency proceedings) was warranted because the capital habeas petitioner in this case, Ernest Valencia Gonzales, appeared to be incompetent and unable to engage in essential communication with his lawyers. Pet. App. A1-A9.

There is no reason to question this straightforward application of the appropriate standard, and indeed, neither the State nor its *amici* offer any basis to do so. The decision below should be affirmed.

STATEMENT OF THE CASE

For more than a decade, since November 1999, Mr. Gonzales and his counsel have sought to press his claims for habeas relief in the federal courts. Pet. App. A2-A4, B1-B7, C1-C7. In early 2006, following the conclusion of related state court proceedings, and after Mr. Gonzales had spent nearly 20 years in prison on death row, his mental health — which had been of serious concern since at least 2000 — deteriorated to the point that he could no longer communicate rationally with his appointed attorneys and could not provide to them "essential" information and insight regarding his claims.[1] Pet. App. A3, A5. Mr. Gonzales's attorneys then moved for a temporary stay of proceedings to allow for a competency determination which would include a psychiatric assessment. Pet. App. A2-A3; Mot. for Competency Determination & to Stay Proceedings, *Gonzales* v. *Schriro*, No. 99-cv-02016 (D. Ariz. Apr. 17, 2006), ECF No. 102. The district court initially agreed to hold a competency hearing but later denied that request on the ground that it lacked authority to grant it. Pet. App. B9, C27-C28. That holding, later reversed by the Ninth Circuit, is at issue here.

1. Over the course of the state trial and sentencing proceedings, Mr. Gonzales had been represented by nearly a dozen different attorneys at different times. Pet. App. A5. For part of the trial

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[1] The district court asserted that Mr. Gonzales's "incompetence arose several years after he had filed his amended petition." Pet. App. C28. This is not the case. Rather, appointed federal habeas counsel raised concerns about Mr. Gonzales's competence soon after representation commenced. *See* Mot. for Competency Determination & to Stay Proceedings & Attachments, *Gonzales* v. *Schriro*, No. 99-cv-02016 (D. Ariz. Apr. 17, 2006), ECF No. 102; Resp. Br. in Opp. 1; Pet. App. B3.

proceedings he had even represented himself — although the state courts later, in the post-conviction stage, determined that he was incompetent to do so based on a series of mental health reports from three different experts, one of them court-appointed, all indicating that Mr. Gonzales was psychotic and unable either to assist counsel or to represent himself. See Supp. Br. in Support of Pet. for Writ of Mandamus 38-40, *Gonzales.* v. *Schriro*, No. 08-72188 (9th Cir. July 31, 2008); Supp. Reply Br. in Support of Pet. for Writ of Mandamus 6, *Gonzales.* v. *Schriro*, No. 08-72188 (9th Cir. Sept. 16, 2008) (quoting state court's finding that, "pursuant to [the court-appointed expert's] finding, [Mr. Gonzales] is incompetent and cannot represent himself in this [state post-conviction] proceeding"); see also Mot. for Competency Determination & to Stay Proceedings, *supra*. Ultimately, however, the state courts ruled that state law did not require a post-conviction capital habeas petitioner to be competent to proceed. See Resp. Br. in Opp. 1; Pet. App. B3.

These habeas proceedings began after Mr. Gonzales was convicted of first-degree murder in 1991 and, thereafter, sentenced to death. Pet. App. A2. He appealed that judgment on a number of grounds, including a claim that the presiding trial judge had been biased against him. Pet. App. A5, C1-C2, C12-C16. The Supreme Court of Arizona affirmed the conviction and sentence in 1995. Resp. Br. in Opp. 1 (citing *State* v. *Gonzales*, 892 P.2d 838, 849 (Ariz. 1995)). Mr. Gonzales then filed state petitions for post-conviction relief, which were eventually denied

in 1999. Pet. App. B3. That same year, Mr. Gonzales initiated federal habeas proceedings.[2]

In this period and thereafter, Mr. Gonzales experienced continuing decline in his mental health. See Pet. App. A3. He no longer understood his legal situation, and particularly the impending sentence of death, and he grew increasingly and irrationally suspicious of his appointed counsel. See Pet. App. A3, C2; see also Supp. Br. in Support of Pet. for Writ of Mandamus, *supra*, at 30-36.

From 2003 through 2006, Mr. Gonzales refused dozens of attempted visits from his counsel and their staff — at one point accusing them of poisoning his food. Pet. App. C2; Emergency Pet. for Writ of Mandamus 24, *Gonzales.* v. *Schriro*, No. 08-72188 (9th Cir. May 22, 2008). He also sent numerous letters and petitions to both the state and federal

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[2] A request for appointment of habeas counsel was filed in the District Court for the District of Arizona in November 1999. Pet. App. A1, C1. The district court appointed the Office of the Federal Public Defender to represent Mr. Gonzales soon thereafter, pursuant to 18 U.S.C. § 3599 (then 21 U.S.C. § 848(q)). Pet. App. C1. An amended habeas petition was filed in 2000 setting forth notice of the claims without addressing the merits, per court order. *Gonzales* v. *Schriro*, No. 99-cv-02016 (D. Ariz. July 17, 2000), ECF No. 28. The case was stayed to allow Mr. Gonzales to return to state court to exhaust some of the claims raised in the petition. Pet. App. A2, B3-B4. The district court eventually ruled that certain claims were procedurally barred before ordering briefing on the merits. This case (as well as other capital habeas cases pending in district court) was stayed pending litigation as a result of *Ring* v. *Arizona*, 536 U.S. 584 (2002), and *Schriro* v. *Summerlin*, 542 U.S. 348 (2004). The district court subsequently dismissed certain claims on procedural grounds, but the merits of Mr. Gonzales's claims have not yet been addressed in pleadings or briefs.

courts starting in 2001,[3] which evidence what one court-appointed mental health expert, Jack Potts, M.D., described as "delusion[s] regarding electronic eavesdropping devices," "paranoi[a] regarding his environment," and "thought processes [that] are at times quite disordered."[4] See Supp. Br. in Support of Pet. for Writ of Mandamus, *supra*, at 38-40; see also Supp. Reply Br. in Support of Pet. for Writ of Mandamus & Attachments, *supra*, at 4-5.

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[3] *See, e.g.*, Supp. Reply Br. in Support of Pet. for Writ of Mandamus, *supra*, at Attach. 1, Ex. H ("Petitioners Petition Requesting To Be A Member (people's) Of the Aztec etc., Tribe's, customs, etc., and Recognized As the Same Within The United States in Addition to the U.S. Constitution"). As reflected in his written letters and petitions, Mr. Gonzales also believed he was "attached through science technology" and that "studies or projects [were] being held or conducted upon [him]" without his consent. *Id.* at Ex. A at 1. He wrote that he had "been through so much pressure mentally with confusion, deception through very evil and wicked (twisted) ways," *id.* at Ex. A at 2, and believed he was connected to the Department of Corrections through "a telephonic, science monitoring device, in which prisoners, attorneys, police, prison officials, civilians etc., are attached to [his] hearing daily," *id.* at Ex. G at 2. He also believed his "thoughts, imaginations, [and] fantasies" were being stolen. *Id.* at Ex. H. at 2.

[4] Mr. Gonzales was identified with schizotypal traits more than 25 years ago by the Arizona Department of Corrections. It appears, however, that the State did not attempt to provide any treatment to Mr. Gonzales until 2007—more than 16 years after the date of his incarceration, and only after the district court had granted an evidentiary hearing in these habeas proceedings on the question of his competency. Emergency Pet. for Writ of Mandamus, *supra*, at 17; Reply Br. in Support of Pet. for Writ of Mandamus 15, *Gonzales.* v. *Schriro*, No. 08-72188 (9th Cir. June 16, 2008). Thus, the deterioration of Mr. Gonzales's untreated condition over the past quarter-century, since the State first identified it, does not result from dilatory tactics or refusal.

2. In January 2006, after the *Ring/Summerlin* litigation was settled for Arizona capital habeas petitioners, see *supra*, note 2, the district court directed the parties to submit briefs on the merits of the claims. Soon thereafter, Mr. Gonzales's counsel moved to stay the proceedings pending a competency determination. Pet. App. A2-A3. The motion recounted counsel's efforts to communicate with Mr. Gonzales, and explained that counsel's inability to speak with him — and his apparent inability to understand counsel — precluded counsel from addressing evidentiary and other issues essential to presentation of the claims. Pet. App. A2-A3; Resp. App. (1A-10A). Among others, the claims of judicial bias could not be fully assessed without information and insights from the trial environment, including off-the-record events and exchanges, that only Mr. Gonzales could offer. Pet. App. A5-A6.

Both the State and the district court initially agreed that "obviously there are some [issues] that [counsel] need Mr. Gonzales to answer." Transcript of Status Hearing Proceedings, *Gonzales* v. *Schriro*, No. 99-cv-02016 (D. Ariz. Oct. 23, 2007), ECF No. 166 (statement of the State)); see also Resp. Br. in Opp. 2 (district court recognizing there are "*claims* where [Mr. Gonzales] potentially will provide beneficial assistance during briefing of the remaining issues" (emphasis in original)). The court cited as an example Mr. Gonzales's claim of judicial bias. See *id.*

The district court, accordingly, ordered the parties to submit updated expert reports on Mr. Gonzales's mental health and, when those reports disclosed "reasonable grounds" to suspect a psychiatric

problem, scheduled an evidentiary hearing.[5] Order, *Gonzales* v. *Schriro*, No. 99-cv-02016 (D. Ariz. Dec. 11, 2006), ECF No. 126; see also Pet. App. B5; Resp. Br. in Opp. 2. It also directed, at the State's request, that Mr. Gonzales be transferred to a State hospital for an extended mental health evaluation. That evaluation resulted in a report concluding that Mr. Gonzales "[has] suffered from a 'genuine psychotic disorder' and [is] 'currently ... unable to communicate rationally for any extended period of time, such as would be required by a legal proceeding.'" Pet. App. A3, C4-C6.

The scheduled competency hearing never occurred, however. While the district court credited the State hospital's psychiatric report, it determined in a written order that it lacked discretion to grant a stay, even if Mr. Gonzales was incompetent, because Mr. Gonzales's "properly-exhausted claims are record-based and/or resolvable as a matter of law." Pet. App. A2, C27-C28. The district court therefore denied the stay request, and ordered proceedings to continue notwithstanding appointed counsel's inability to communicate with Mr. Gonzales about his claims. Pet. App. C29; Resp. Br. in Opp. 2.

3. Counsel thereafter filed in the Ninth Circuit, on May 23, 2008, an emergency motion for stay of the district court's proceedings and an emergency petition for writ of mandamus. Pet. App. D1, I1.

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[5] The district court also denied the State's subsequent motion for reconsideration, rejecting the State's argument that Mr. Gonzales had not demonstrated that his assistance was necessary for counsel to complete the merits briefing on his remaining claims. State's Mot. for Reconsideration, *Gonzales* v. *Schriro*, No. 99-cv-02016 (D. Ariz. Dec. 21, 2006), ECF No. 127; Order, *Gonzales* v. *Schriro*, No. 99-cv-02016 (D. Ariz. Jan. 17, 2007), ECF No. 128.

That motion requested an order directing the district court to issue a temporary stay of proceedings, hold a hearing, and make a finding on the issue of Mr. Gonzales's competence — and then, if necessary, exercise its discretion to determine whether a stay should issue. See Emergency Pet. for Writ of Mandamus, *supra*.

The court of appeals granted mandamus relief. Pet. App. A9. Rejecting the district court's analysis, it held that federal courts have discretion to stay habeas proceedings, notwithstanding that a claim may be described as "record-based," and such discretion is properly exercised when a capital habeas petitioner becomes incompetent to communicate with his or her counsel and communication is "essential" to presentation of the claims. Pet. App. A1-A9. Because the record in this case supported a finding that Mr. Gonzales was incompetent, and it appeared that communication between him and his counsel would be essential to a full assessment and effective presentation of at least some of his claims — in particular, the claim of judicial bias[6] — the court of appeals determined that a temporary stay of proceedings, pending determination of Mr. Gonzales's competency, should issue. *Id.*

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[6] Although the court of appeals focused primarily on the judicial bias claim, habeas counsel also argued that Mr. Gonzales's insight and institutional knowledge were necessary to address whether the trial court improperly permitted the victim to make a courtroom identification of Mr. Gonzales and to remain in the courtroom at key points in the trial, and whether the trial court improperly relied on pecuniary gain and the creation of grave risk of harm to another as aggravating factors. Brief on Implications of Present Incompetency on Rohan Proceedings, *Gonzales* v. *Schriro*, No. 99-cv-02016 (D. Ariz. Jan 10, 2008), ECF No. 184.

SUMMARY OF ARGUMENT

A stay of federal capital habeas proceedings is proper when a petitioner's incompetence leaves him or her unable to communicate with counsel and such communication is essential to the prosecution of habeas claims. Neither the State nor its *amici* provide any basis for stripping a district court's authority to grant a stay if a claim might be described as "record-based" or "legal in nature," or when a "next friend" might be appointed. Likewise, they offer no reason to doubt that a stay was warranted in this case based on the findings below.

1. District courts may exercise broad discretion to stay habeas proceedings including a state's death sentence. 28 U.S.C. § 2251. Federal statutes likewise afford capital habeas petitioners an "enhanced" right to qualified legal counsel, *Martel*, 132 S. Ct. at 1284, which this Court has read to include "a right for that counsel meaningfully to research and present a defendant's habeas claims," *McFarland*, 512 U.S. at 858; see also 18 U.S.C. § 3599. These two principles, taken together, leave no room for doubt that a district court has discretion to stay habeas proceedings when appropriate, in its view, to guarantee a capital habeas petitioner a "meaningful" right to counsel. *McFarland*, 512 U.S. at 858.

Nothing in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, compels, or even supports, a contrary result. That statute does not insist that concerns over finality and speedy resolution trump all other interests, as the State and its *amici* assert, and nowhere does it reveal an intent to undermine a district court's traditional discretion to enter stays or a capital habeas petitioner's right to meaningful

assistance of counsel. Quite the opposite, given that AEDPA now renders a capital habeas petitioner's first petition his or her singular opportunity to secure relief in federal court, it is all the more necessary, as this Court has recognized, to ensure that the petitioner's rights are fully protected. Respecting a court's traditional discretion to stay habeas proceedings "in the interests of justice" to protect the petitioner's ability to communicate with counsel is fully consonant with that goal. See *Martel*, 132 S. Ct. at 1287.

2. Consistent with these principles, the court of appeals correctly held that a stay is proper if communication between the capital habeas petitioner and his or her counsel is impossible due to incompetence but would be "'essential to counsel's ability to meaningfully prosecute' [the] habeas claims." Pet. App. A5. This standard comports with other competency-based protections afforded during trial and at the time of execution, and it strikes the right balance in the habeas context.

The State, however, urges a rule that would do the opposite. It contends that district courts should be barred from exercising their discretion to enter a stay of habeas proceedings when claims may be described as merely "record-based" or "legal in nature," or when a "next friend" might be appointed. Not one of these proposals is supported by statute or this Court's precedent, and none is consistent with traditional habeas practice. Such restrictions would require courts to engage in artificial line-drawing that not only would be arbitrary, denying relief to similarly situated capital habeas petitioners merely because one individual's claims might be deemed more "record-based" than another's, but almost certainly would prove unworkable in practice. Such

distinctions — among them, for instance, questions of fact, questions of law, and mixed questions of law and fact — already frustrate litigants and courts in a wide variety of legal contexts.

The standard applied below, permitting a stay when the district court deems that communication is essential between an incompetent capital habeas petitioner and his or her counsel, avoids these problems. It allows courts to take into account the unique circumstances of each case and exercise their discretion to issue or to deny a stay based upon all relevant considerations, which often include first-hand observation of the petitioner. Experience, moreover, dispels the State's unfounded fears that the standard will pose a risk of abuse or indefinite delays in future cases, as the Solicitor General recognizes.

3. A stay was warranted in this case because Mr. Gonzales is incompetent and unable to communicate with counsel according to multiple psychiatric assessments — including court-appointed experts — and his participation is essential to the prosecution of his habeas claims. In particular, his claim of judicial bias depends especially upon his ability to communicate; his appointed federal habeas attorneys were new to the case, and no one but Mr. Gonzales could properly assist them in scouring the record, placing a first-hand gloss on it, and developing a full and complete picture of what happened. There is no basis, apart from the conclusory assertions of the State and the Solicitor General, to disturb this holding.

Stays of capital habeas proceedings as a result of incompetence are sure to be infrequent both because of the high bar set in incompetency proceedings and the "essential communication" standard recognized

below. Here, however, the standard was satisfied, and temporary postponement was thus entirely proper. The decision below should be affirmed.

ARGUMENT

I. DISTRICT COURTS HAVE BROAD DISCRETION TO STAY HABEAS PROCEEDINGS AND TO ENSURE A CAPITAL HABEAS PETITIONER'S ABILITY TO COMMUNICATE WITH COUNSEL.

The State and the Solicitor General argue that the federal habeas right-to-counsel provision, 18 U.S.C. § 3599(a)(2), should not be interpreted to create a "right to competence," with an associated "right ... to a stay of [habeas] proceedings if [the capital habeas petitioner] is not competent to assist his counsel." U.S. Br. 2; accord Pet. Br. 3-4. However, that is not the question presented in this case. The issue is whether courts have authority to issue a stay, not whether capital habeas petitioners enjoy a freestanding "right to competence," or what the contours of such a right may be. The Court need not reach that question in order to uphold the discretionary, and temporary, stay of proceedings issued in this case. Accord *McFarland*, 512 U.S. at 858 ("This conclusion by no means grants capital defendants a right to an automatic stay of execution. Section 2251 does not mandate the entry of a stay, but dedicates the exercise of stay jurisdiction to the sound discretion of a federal court.").

1. Federal courts indisputably have discretion to stay proceedings related to a pending petition for writ of habeas corpus, including a state sentence of death. That discretion, traditionally recognized as within a court's inherent authority, *e.g.*, *Rhines* v. *Weber*, 544

U.S. 269, 275 (2005) (citing *Landis* v. *N. Am. Co.*, 299 U.S. 248, 257 (1936)); *Rees* v. *Peyton*, 386 U.S. 989 (1967), was codified by federal statute:

> A justice or judge of the United States before whom a habeas corpus proceeding is pending, may ... stay any proceeding against the person detained in any State court or by or under the authority of any State *for any matter* involved in the habeas corpus proceeding.

28 U.S.C. § 2251(a)(1) (emphasis added).

This provision is the necessary starting point for any assessment of the scope of a district court's discretion to stay habeas proceedings. Notably, it states no limitation on the court's authority, either with respect to the nature of the case or reason for the stay, but instead "dedicates the exercise of stay jurisdiction to the sound discretion of a federal court." *McFarland*, 512 U.S. at 858.

The statute also expressly contemplates issuance of a stay to ensure that a capital habeas petitioner is afforded the benefit of consultation with counsel. While subsection (a)(1) of § 2251 authorizes issuance of a stay *after* a habeas petition has been filed and is pending, subsection (a)(3) extends that same authority to proceedings *before* a petition is filed in one particular circumstance: "[i]f a State prisoner sentenced to death applies for appointment of counsel pursuant to [18 U.S.C. §] 3599(a)(2) ... that court may stay execution of the sentence of death [for up to] 90 days after counsel is appointed ...." 28 U.S.C. § 2251(a)(3).

This provision establishes, beyond doubt, that the general stay jurisdiction conferred by 28 U.S.C. § 2251(a)(1) includes authority to issue a stay of execution to ensure that a capital habeas petitioner

has an adequate opportunity to obtain representation and that counsel, in turn, has a "meaningful[ ]" opportunity "to research and present a defendant's habeas claims." *McFarland*, 512 U.S. at 857-58.[7] There is no reason, and certainly no basis in the statute, to preclude a court from exercising this authority when the capital habeas petitioner's inability to consult with counsel arises not from financial indigence, as in *McFarland*, but rather from mental incapacity.

2. That district courts have discretion to stay proceedings in these situations is independently confirmed by 18 U.S.C. § 3599. That section, incorporated by reference in 28 U.S.C. § 2251(a)(3), "grants indigent capital defendants a mandatory right to qualified legal counsel." *McFarland*, 512 U.S. at 854. It also sets forth specific qualifications that an appointed attorney must generally possess, including experience handling felony trials and appeals within the federal system. 18 U.S.C. § 3599(b)-(e).

This Court held in *McFarland* that the provision of counsel pursuant to 18 U.S.C. § 3599 would be rendered largely inconsequential if it did not include "a right for that counsel meaningfully to research and

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[7] Subsection (a)(3) of 28 U.S.C. § 2251 was, in fact, enacted in response to *McFarland*. H. R. Rep. No. 109-333, at 109-10 (2005). That opinion interpreted the statute to authorize district courts to issue a pre-habeas petition stay of execution, even though the provision did not then explicitly provide such authority, in order to vindicate the capital habeas petitioner's right to counsel conferred by 18 U.S.C. § 3599(a)(2) (then 21 U.S.C. § 848(q)(4)(B)). *See McFarland*, 512 U.S. at 857-58. Subsection (a)(3) expressly conferred that authority, and imposed limitations on the length of the stay. *See* Pub. L. No. 109-177, 120 Stat. 192, 251 (2006).

present a defendant's habeas claims," and therefore § 3599 must be interpreted to include that right. 512 U.S. at 858. The same must be said for counsel's ability to communicate with his or her client. Appointment of counsel offers no real benefit to a capital habeas petitioner unless that counsel has a "meaningful[ ]" opportunity to communicate and consult with the client to develop and assess the claims to be presented on the client's behalf in light of the client's insights and views. *Id.* In other words, the right to counsel encompasses the capacity to communicate.

When a capital habeas petitioner's incompetence renders that communication impossible, the right of representation expressly guaranteed by § 3599 is jeopardized, as are the fairness and integrity of the habeas proceedings. In those rare and limited circumstances, district courts can and should (subject to discretionary considerations discussed below, *infra* pp. 20-30) issue a stay of proceedings to fulfill the statutory promise of representation.

Recognition of this authority is consonant with constitutional guarantees and common law practice. While the Sixth Amendment does not of its own force grant a general right to counsel in all post-conviction proceedings, other constitutional provisions — such as, among others, the Fifth Amendment — do offer some protection for capital habeas petitioners, and should at the least prohibit execution of a sentence against a petitioner who is arbitrarily denied safeguards otherwise available to similarly situated individuals. See, *e.g.*, *Ohio Adult Parole Auth.* v. *Woodard*, 523 U.S. 272, 289 (1998) (opinion of O'Connor, J.). Further, it was well recognized at common law that, if a person becomes insane after trial and judgment, and therefore unable to press a

claimed defense, execution must be stayed. See, *e.g.*, 4 William Blackstone, Commentaries *24-25 (1769) ("[I]f, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, he might have alleged something in stay of judgment or execution.").[8] Particularly in light of these constitutional and common law principles, it is eminently reasonable to construe the statutory provision for counsel in 18 U.S.C. § 3599 as warranting a stay of proceedings when the capital habeas petitioner's incompetence renders communication impossible.[9]

In fact, the State and Solicitor General concede this point. They agree that a stay may be appropriate when an "inmate's input is essential to further the federal habeas corpus litigation." Pet. Br. 14; U.S.

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[8] *See also McNally* v. *Hill*, 293 U.S. 131, 136 (1934) ("To ascertain its meaning and the appropriate use of the writ [of habeas corpus] in the federal courts, recourse must be had to the common law, from which the term was drawn, and to the decisions of this Court interpreting and applying the common law principles which define its use when authorized by the statute.").

[9] In failing to recognize a district court's broad discretionary authority under 28 U.S.C. § 2251, the State argues that interpreting 18 U.S.C. § 3599 in this way "would result in disparate treatment of indigent and non-indigent [capital habeas petitioners]." Pet. Br. 15. The State's argument rests on a fundamental misunderstanding of the district court's authority to issue stays. That authority derives not from § 3599 but from § 2251, which applies in proceedings involving all capital habeas petitioners—whether indigent or not. Section 3599 simply confirms that this discretion extends to circumstances in which counsel is appointed by the court. In any event, the point is entirely academic, as the State has cited no cases (nor could it) in which a condemned state prisoner, having initiated federal habeas proceedings, is represented by retained counsel.

Br. 29 (conceding that a stay may be appropriate "for a limited period to afford the prisoner the opportunity to regain his competence").

3. A stay of proceedings in these circumstances is, moreover, fully consistent with AEDPA. The primary purpose of AEDPA was to reduce delays and promote finality, not to prevent a full and fair federal habeas hearing. *Rhines*, 544 U.S. at 276. Indeed, when AEDPA was passed, Congress preserved federal courts' broad discretionary powers to stay proceedings pursuant to 28 U.S.C. § 2251. Given this express preservation of stay authority, it cannot be the case, as the State and its *amici* appear to contend, see Pet. Br. 19; U.S. Br. 27, that a stay may be deemed invalid merely because it delays resolution of the habeas petition and final execution of sentence.

Congress also re-enacted, post-AEDPA and post-*Rohan ex rel. Gates* v. *Woodford*, 334 F.3d 803, 816 (9th Cir. 2003) (recognizing a district court's discretion to stay proceedings where the capital habeas petitioner is incompetent to communicate with counsel), the statutory right to counsel at 18 U.S.C. § 3599. See Pub. L. No. 109-177, 120 Stat. 192, 222 (2006). That statute, this Court has said, reflects Congress's recognition "that federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty." *McFarland*, 512 U.S. at 859.

While AEDPA was undoubtedly intended to advance "interests in finality and speedy resolution of federal [habeas litigation,]" it does not do so at all costs. *E.g.*, *Rhines*, 544 U.S. at 277-79. Rather, these interests must be balanced against others reflected in the statute, *id.*, including the need — recognized in both 18 U.S.C. § 3599 and 28 U.S.C. § 2551 — to ensure that capital habeas petitioners have access to,

and can "meaningfully" benefit from, the assistance of qualified counsel. *McFarland*, 512 U.S. at 858. Far from honoring AEDPA's purposes, a categorical bar against stays to address a petitioner's incompetence to communicate with counsel would violate the plain language of the statute, which "dedicates the exercise of stay jurisdiction to the sound discretion of a federal court," *McFarland*, 512 U.S. at 857-58.

A categorical bar would subvert Congress's overarching goal of guaranteeing "'fundamental fairness in the imposition of the death penalty.'" *Martel*, 132 S. Ct. at 1285 (quoting *McFarland*, 512 U.S. at 855). Capital habeas petitioners often have but one opportunity to pursue relief in the federal system.[10] Recognizing a court's authority to stay habeas proceedings, when appropriate to ensure that such opportunity is fully available, is entirely consistent with — and, indeed, effectively mandated by — AEDPA and this Court's precedents. See, *e.g.*, *Martel*, 132 S. Ct. at 1285; *Rhines*, 544 U.S. 278-79; *McFarland*, 512 U.S. at 858.[11]

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[10] *See, e.g.*, 141 Cong. Rec. H4086 (daily ed. Feb. 8, 1995) ("The bill before us today balances the need for finality and accountability with a firm regard for due process of law and full constitutional protections ... Convicted criminals, particularly murderers on death row, will generally get only one opportunity to raise their claims in Federal court using habeas corpus petitions." (Statement of Rep. Bill McCollum (Fl.))).

[11] The Solicitor General incorrectly suggests that district courts lack authority to conduct competency hearings. U.S. Br. 22-23. In addition to a court's inherent authority to conduct such examinations, this Court recognized in *Rees* v. *Peyton*, 384 U.S. 312, 312 (1966), that general federal competency statutes may be relied upon by district courts when competency issues arise in federal habeas litigation.

II. A STAY IS APPROPRIATE WHEN A CAPITAL HABEAS PETITIONER'S INCOMPETENCE PRECLUDES ESSENTIAL COMMUNICATION.

Because district courts have authority to issue a stay of execution to ensure effective attorney-client communication, this case concerns only the standard by which that discretion should be exercised. But on that question, the parties in this case agree: A stay is properly granted when a capital habeas petitioner's incompetence renders him or her incapable of communicating with counsel and such communication is "essential" to the prosecution of his claims. See Pet. Br. 14 (acknowledging that a stay is proper if capital habeas petitioner's input is "essential"); accord U.S. Br. 29 ("crucial").

The parties diverge, however, on what this standard means in practice. Mr. Gonzales would leave the standard's application to the district court's discretion; the State and the Solicitor General would not. Instead, they argue that a district court must end the inquiry and cannot grant a stay if the claims might be described as "record-based" or "legal in nature" or when a "next friend" might be appointed, because, in those cases (they assert), communication between a capital habeas petitioner and counsel are never essential. But nothing in the statute or this Court's precedents supports such categorical limitations, which would be unreasonable and unworkable in practice.

A. The District Court's Discretion To Stay Habeas Proceedings Is Properly Assessed By An "Essential Communication" Standard.

The rule urged by Mr. Gonzales fits comfortably within existing habeas practice and precedent. This Court has held, in *McFarland* v. *Scott*, that a stay of habeas and state execution proceedings should issue when necessary to ensure "that counsel [has the opportunity] meaningfully to research and present a defendant's habeas claims." 512 U.S. at 858. That is precisely the situation here. When a capital habeas petitioner's incompetence prevents communication with counsel and those communications are deemed essential to presentation of the claims, the capital habeas petitioner's inability to communicate deprives counsel of a "meaningful[]" opportunity to present his or her client's case and thus warrants a stay. *Id.*

The "essential communication" standard also comports with two competency-based safeguards that bookend a capital habeas petitioner's passage through the courts. First, at trial, both the Constitution and statute prevent the defendant from being tried if he or she lacks "sufficient present ability to consult with his lawyer" and cannot assist in his or her own defense. *Dusky* v. *United States*, 362 U.S. 402, 402 (1960); see also 18 U.S.C. § 4241(a). Later, at the conclusion of all proceedings, the Constitution forbids executing a condemned prisoner who is unable to understand the nature or reasons for his execution. *Panetti* v. *Quarterman*, 551 U.S. 930, 957-59 (2007); *Ford* v. *Wainwright*, 477 U.S. 399 (1986).

The competency threshold for imposing a stay during federal habeas proceedings properly falls along this spectrum. Post-conviction habeas

proceedings do not implicate the same due process protections as those applied during an initial trial. See, *e.g.*, *Pennsylvania* v. *Finley*, 481 U.S. 551, 555-57 (1987); see also *Martinez* v. *Ryan*, 132 S. Ct. 1309, 1315 (2012). But, at the same time, a capital habeas petitioner's statutorily conferred right to present a habeas petition in federal court and to assistance of counsel for that petition necessitate a broader standard for imposing a stay than is applied before execution, after all avenues of relief have been lost or abandoned. Cf. *Ford*, 477 U.S. at 422 & n.3 (Powell, J., concurring) (competency at execution need not include the "ab[ility] to assist in [one's] own defense").

For this same reason, there is no tension between Mr. Gonzales's position and *Ford*. Pet. Br. 17 (arguing that this Court has "limited a capital prisoner's right to competency in post-conviction proceedings" to the right recognized in *Ford*); U.S. Br. 19 (same). *Ford* addresses a different doctrine (the Eighth Amendment), with different considerations (such as whether retribution is served, *Panetti*, 551 U.S. at 958), and at a different stage of the proceedings (execution). Here, by contrast, the integrity of the federal habeas proceedings is at issue. The structure and legislative history of AEDPA make clear that the integrity of these proceedings was a centerpiece of that legislation and of significant value to a Congress that recognized the risks in placing stringent limits on the prosecution of habeas claims in the federal courts.[12]

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[12] The Solicitor General's concern that a holding authorizing a stay would "supersede" (U.S. Br. 20) questions arising under *Ford* is a wholly circular argument that there should be no stay because that would cause delay. In any event, a stay here would not change the *Ford* analysis once the proceeding has reached that stage.

In short, setting the standard at whether communication is essential for presentation of the claims readily conforms with other competency standards and strikes the appropriate balance, just as *McFarland* implicitly recognizes.

B. The District Court's Discretion Cannot Be Artificially Constrained To Exclude Certain Categories Of Cases.

Despite acknowledging that a stay may be proper where a capital habeas petitioner's communication with counsel is "essential" or "crucial" to his or her claim, the State maintains that district courts should be categorically barred from staying *any* case where the claims can be described as merely "record-based" or "legal in nature" or where a "next friend" might be appointed. Pet. Br. 14; U.S. Br. 29. But these artificial constraints find no support in the pages of the United States Code or this Court's decisions and are, in fact, flatly inconsistent with both. See, *e.g.*, *McFarland*, 512 U.S. at 858.

1. That A Claim May Be Described As "Record-Based" Or "Legal In Nature" Does Not Render Communication Between Counsel And Client Meaningless Or Non-Essential In All Cases.

The State rests much of its protest on the contention that a district court ought to be foreclosed from exercising its discretion to stay habeas proceedings whenever the claims may be labeled as "record-based" or "legal in nature." Pet. Br. 14, 16; see also U.S. Br. 16, 31. This contention falls flat, however, because its premise — that communication between counsel and client is *per se* unnecessary in such circumstances — is demonstrably false. Even in

cases that can be so described, communication with counsel may still be essential to the presentation of a capital habeas petitioner's claims in at least two ways.

First, the client may have information that, although not available from the record itself, bears upon the relative strength of the claims or the manner in which they should be presented. Such information provides a gloss on the existing record that may well demonstrate, to the attorney if not the client, how best to proceed.

Examples are easy to imagine. For starters, the decision whether to seek an evidentiary hearing in the first place — and thus whether a claim can fairly be called "record-based" — cannot always be made in a vacuum, without a full picture of what the client knows. See U.S. Br. 29. But even when the record is rightly deemed closed, a client's insight may still be essential to the proper consideration of his or her claims. Doctrines governing ineffective assistance of counsel or judicial bias claims, for instance, incorporate presumptions that regularly require *ex post* supposition about what may have motivated someone else's decisions at trial. See, *e.g.*, *Cullen* v. *Pinholster*, 131 S. Ct. 1388, 1407 (2011) (courts required to "entertain the range of possible 'reasons'" for counsel's conduct). For such inquiries, the client is best positioned to assist counsel in rebutting hypotheses — for example, about supposed tactical reasoning — that he or she knows to be wrong, thereby helping the parties and the court to avoid an erroneous "*post hoc* rationalization of [others'] conduct." *Wiggins* v. *Smith*, 539 U.S. 510, 526-27 (2003).

The rules of exhaustion are also illustrative. For example, where an attorney argued a claim in an

untranscribed proceeding, a capital habeas petitioner may have information showing that particular claims were actually exhausted in state court or that exhaustion should be excused, even though the existing record does not reflect those facts. *Martinez*, 132 S. Ct. at 1318, 1320 (noting that "[in]effective assistance claims often depend upon evidence outside the trial record" and holding that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective"); see also, 28 U.S.C. § 2254(b)(1)(B)(ii) (exhaustion may be excused where "circumstances exist that render such process ineffective to protect the rights of the applicant"). Such intelligence is particularly important when preparing or seeking to amend a habeas petition, or when deciding whether to seek a stay to exhaust remaining state claims under *Rhines*.

That a district court's consideration of § 2254(d)(1) claims is generally limited to the state-court record does not mean, as the State contends, that client participation is automatically meaningless even in those cases. Pet. Br. 14-15 (citing *Pinholster*, 131 S. Ct. 1398). The examples above describe just a few situations in which a client's communication with counsel would be essential notwithstanding *Pinholster's* holding that evidentiary hearings are available in only limited circumstances. Further, the prospect of obtaining an evidentiary hearing remains open. See *Pinholster*, 131 S. Ct. at 1411 n.20. An evidentiary hearing might be warranted in order to assess the substantive validity of the claims once § 2254(d) has been found to be satisfied. See *id.* at 1412 (Breyer, J., concurring in part and dissenting in

part) (giving examples). A client's participation, it practically goes without saying, will be essential to at least some such hearings and cases.

This is not to say that a district court must issue a stay upon finding the capital habeas petitioner incompetent and communication between capital habeas petitioner and counsel are essential. See *McFarland*, 512 U.S. at 858 ("Section 2251 does not mandate the entry of a stay, but dedicates the exercise of stay jurisdiction to the sound discretion of a federal court."). For example, if a capital habeas petitioner has a history of voluntarily taking medication but refuses that medication during the course of habeas proceedings for the purpose and with the express intention of manipulating the process and preventing final adjudication, a stay could be properly denied as an exercise of discretion. See also *infra* at pp. 27-30 (proper appointments of a next friend).

Second, the positions of the State and the Solicitor General ignore the fundamentals of the attorney-client relationship. Rules of professional conduct *obligate* attorneys to consult broadly and frequently with their clients and expressly as to strategic and tactical matters. See, *e.g.*, American Bar Association, Model Code of Prof'l Conduct R. 1.4 (Communication); American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 1008 (2003) ("[There is an] obligation of counsel at every stage of the case to keep the client informed ... and to consult with the client on strategic and tactical matters. Some decisions require the client's knowledge and agreement [but even those that do not] should nonetheless be fully discussed with the client beforehand.").

Such consultation may be required, for example, before counsel decides: whether to drop a particular claim that appears baseless (cf. *Rees* v. *Peyton*, 384 U.S. 312 (1966)); whether to seek a stay to further exhaust certain claims (*e.g.*, *Rhines*, 544 U.S. 269); or whether to seek an appeal or a certificate of appealability (*e.g.*, *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983)). A bright-line rule that would, in many cases, require an attorney to proceed without ethically mandated client consultation undermines these basic canons of professional responsibility. Congress should not be assumed to have intended such a seemingly irrational result *sub silentio*.

The point for these purposes is not to delineate all possible instances in which client communication may be essential even though the claims could also be considered "record-based" or "legal in nature," but only to show that the categories are not mutually exclusive. The State's groupings do not establish that client communication would be necessarily meaningless for all cases that fall within them, and, as such, they provide no basis for restricting a district court's discretion *ex ante*.

Such a standard also would be unworkable in practice. Courts already struggle mightily to decide when a question is one of "law" or "fact," or "mixed." See, *e.g.*, *Miller* v. *Fenton*, 474 U.S. 104, 113-14 (1985) (noting "the practical truth that the decision to label an issue a 'question of law,' a 'question of fact,' or a 'mixed question of law and fact' is sometimes as much a matter of allocation as it is of analysis"). The State's proposed line-drawing merely imports those difficulties into yet another context and, contrary to the State's own wishes, promises inevitable satellite litigation as to these complex questions. The better and more workable approach is the one that Congress

already reflected in the statute — namely, to leave the decision whether to impose a stay of habeas proceedings to the district court's discretion. See 28 U.S.C. § 2251; accord *McFarland*, 512 U.S. at 858.

2. That A "Next Friend" Might Be Appointed Does Not Render Communication Between Counsel And Client Meaningless Or Non-Essential In All Cases.

The State and the Solicitor General also point to the potential appointment of a "next friend" as another cure-all for any incompetent capital habeas petitioner's inability to communicate with counsel. Pet. Br. 16-17 (citing *Whitmore* v. *Arkansas*, 495 U.S. 149 (1990)); U.S. Br. 25, 27, 30-31. The upshot of this position — that the mere existence of "next friend" standing as a concept renders communication between counsel and client meaningless or non-essential in all cases — is simply wrong.

First, there will be many circumstances in which a "next friend" is unavailable. As this Court has explained, "'next friend' standing is by no means granted automatically" and requires, among other things, that one be "truly dedicated to the best interests of the person on whose behalf he seeks to litigate ... [and] have some significant relationship with the real party in interest." *Whitmore*, 495 U.S. at 163-64. These requirements should be all the more difficult to meet in situations where a capital habeas petitioner's incompetence prevents effective communication not just to assist counsel but with everyone, including persons with whom he has a "significant relationship."

Second, until a "next friend" is actually appointed, a stay may still be necessary to ensure that counsel

has a meaningful opportunity to present the claims. A "next friend" may be permitted to make many of the strategic decisions otherwise left to the client, but, until appointment, counsel has no authority to make those decisions on his or her own. See *supra* § II.B.1.

Finally, even if a "next friend" is appointed, it may remain necessary to communicate with the capital habeas petitioner personally because "he alone possesses" essential information relevant to the claims. *Rohan ex rel. Gates*, 334 F.3d at 816. Indeed, because a next friend "cannot get inside [an incompetent client's] head any more than his counsel can," it is "difficult to see what purpose appointing [one] even serves in this context." *Id.*

For his part, the Solicitor General does not expressly join the State's attempt to stretch the "next friend" doctrine to resolve this case. Instead, the Solicitor General offers an inventive proposal of his own: Counsel can serve as a sort of de facto "next friend," either permanently or at least temporarily while another is located, by making decisions and strategic choices for the client in the interim. U.S. Br. 30-31. This suggestion fares no better than the State's. The attorney-client relationship does not, by itself, satisfy the prerequisites for "next friend" status, particularly when, as here, counsel is appointed and lacks any pre-existing relationship with the client. See, *e.g.*, *Centobie* v. *Campbell*, 407 F.3d 1149 (11th Cir. 2005). The Solicitor General's sheer speculation that counsel might find ways to "establish facts outside the record that bear on a potentially meritorious claim" without the client's input, U.S. Br. 30, could be a factor in deciding whether to issue a stay, but it is certainly not an

across-the-board substitute for potentially essential input from the client himself.[13]

None of this is to say that potential appointment of a "next friend" is not an option to be considered or that it would have no bearing on the stay issue. Appointment of a "next friend" is one of several options, along with a stay of proceedings, that a court might consider when faced with an incompetent capital habeas petitioner. And, if a "next friend" is appointed and that appointment does in fact render further communication between the client and counsel non-essential, nothing would prevent the district court from properly lifting the stay. At bottom, the focus remains on whether client-counsel communication is essential, but not feasible. If so, "next friend" appointments are not a panacea; they are but another option in the district court's tool box.

C. The "Essential Communication" Standard Is The Most Practical And Workable.

The only other objection offered against the standard applied in this case is that it will encourage false claims of incompetency and result in "indefinite [delays] and protracted litigation in federal habeas cases [across the nation]." States Amicus Br. 2; see also Pet. Br. 19. These concerns are dramatically overblown. Far from "widespread," States Amicus Br.

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[13] The Solicitor General's supporting contention that defense counsel might call the client's former attorneys or others to testify as to the client's knowledge or preferences, U.S. Br. 30, creates more questions than it answers. Those persons would likely be prohibited from testifying, especially in front of the State, because of attorney-client privilege, and in any event would not necessarily have knowledge of the present facts and current preferences of the client.

6, and far from causing "lengthy delays," *id.*, claims of incompetency are in fact infrequently raised — even in those circuits which expressly allow them — and are often quickly resolved.

Although potentially available in any circuit,[14] incompetency claims of the type presented in this case are quite rare, as the Solicitor General has acknowledged. U.S. Cert. Br. 18. From June 2003 (when these claims were first recognized) until September 2010, federal courts handled 701 capital habeas cases. Resp. Supp. Br. 3 n.3. Yet, incompetency claims were raised in only 34 of those cases — less than five percent. *Id.* These claims are not only few in number but also rarely result in a stay; all told, only 1.5% of all capital habeas cases nationwide were stayed as a result of incompetency claims. Further, in a survey of the fourteen States that joined the merits *amicus* brief in support of the State, only *one* such stay (from Alabama) was granted in over *seven* years — representing a mere 0.65% of all capital habeas cases in those States over that period.[15] In fact, incompetency claims of this type have *never* been filed in nine of those fourteen States. And, the four states with the largest death row populations — whose criminal systems would seem to face the greatest threat from these potential claims

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[14] All circuits that have confronted the issue have either expressly held or implicitly assumed this is the case, or have at least declined to hold that it is not. U.S. Cert. Br. 18.

[15] From June 2003 through September 2010, there were 153 capital habeas cases filed in these States, and in only nine of those cases did the capital habeas petitioner seek a stay based on incompetency. Furthermore, those stays were sought in only five (Utah, Nevada, Oklahoma, Alabama, and Arkansas) of the fourteen States.

— are conspicuously absent from the States' Amicus Brief on the merits.[16]

These stays are, moreover, not "indefinite," as the State and the Solicitor General suggest. To the contrary, they are by nature *temporary* — only in effect during the period of incompetency. Courts monitor petitioners under these stays through periodic status reports and (in appropriate cases) treatment directives. *E.g.*, *Holt* v. *Woodford*, No. 1:97-cv-06210 (E.D. Cal. Nov. 21, 2008); see also *White* v. *Ryan*, No. 08-cv-08139 (D. Ariz. Sept. 29, 2010). In fact, these court-ordered treatment plans have facilitated competence restoration to avoid an indefinite stay;[17] when a capital habeas petitioner regains the ability to communicate with counsel, the stay is properly lifted, as courts have not hesitated to do. See, *e.g.*, Mot. to Amend Pet., *Grant* v. *Workman*, No. 5:10-cv-00171 (W.D. Okla. June 1, 2012); *Hill* v. *Calderon*, No. 4-94-CV-641 (N.D. Cal. Jan. 6, 2012).

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[16] As of 2010, California (683), Florida (390), Texas (330), and Pennsylvania (218) not only individually have the largest death row populations, but combined they house more than half of all death row prisoners in the United States. *See* Report by U.S. Justice Dep't Bureau of Justice Statistics, "Capital Punishment 2010: Statistical Tables" (Dec. 20, 2011). Three of these states (Florida, Texas, and Pennsylvania) joined the *amicus* brief in support of certiorari, but none subsequently joined the *amicus* brief in support of the State here. The fourth state (California) joined neither the *amicus* brief in support of certiorari nor the *amicus* brief on the merits.

[17] Antipsychotic medications are an accepted, often essential treatment for many psychoses including delusional disorder and schizophrenia. *See* American Psychiatric Association et al. Amicus Br. 9-10, *Sell* v. *United States*, No. 02-5664, 2003 WL 176630 (U.S. Jan. 22, 2003). The newer antipsychotic drugs have proven effective for many more people and have even more favorable side-effect profiles. *See id.*

Courts also have access to numerous procedural tools to mitigate any delay. In at least half of the total 34 competency claims brought nationwide between June 2003 and September 2010, judges made a competency determination without a full hearing, based on psychiatric reports or other available evidence. *E.g.*, *Paul* v. *United States*, 534 F.3d 832, 853 (8th Cir. 2008). In addition, both parties sometimes stipulate to the incompetence of the capital habeas petitioner.[18] Even the State recently stipulated to the incompetence of a capital habeas petitioner who was then granted a stay. See *White*, No. 08-cv-08139.

What is more, courts can dismiss claims on procedural grounds or on a finding of dilatory or improper purpose, without need for any competency determination. *E.g.*, *Lisle* v. *McDaniel*, No. 2:03-CV-1005 (D. Nev. July 19, 2006); *Stanley* v. *Calderon*, No. 2:95-cv-1500 (E.D. Cal. Mar. 1, 2006). Courts also have significant leeway to assess malingering and can deny motions for competency hearings upon a finding of malingering. *E.g.*, *id.*; *Ferguson* v. *Secretary for Dep't of Corr.*, 580 F.3d 1183, 1221 (11th Cir. 2009). Indeed, courts are well-equipped to identify malingering.[19]

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[18] *See, e.g.*, *Jones* v. *Wong*, No. 2:97-cv-02167 (E.D. Cal. Aug. 28, 2009); *Holt*, No. 1:97-cv-06210; *Millwee* v. *Ayers*, No. 2:99-cv-07220 (C.D. Cal. Nov. 21, 2008); *McPeters* v. *Ayers*, No. 1:95-cv-05108 (E.D. Cal. Sept. 18, 2007); *Card* v. *Hardison*, No. 1:93-cv-00030 (D. Idaho Oct. 20, 2006).

[19] For a review of common techniques used to identify malingering in judicial proceedings and their efficacy, *see* Gary B. Melton, et. al., *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers*, at 54 (2d ed. 1997); *see also* Richard Rogers, *Clinical Assessment of Malingering and Deception*, at 131 (2d ed. 1997); L. Elizabeth

When a competency hearing is actually held, the claims are generally resolved without substantial difficulty or delay. See, *e.g.*, *Rogers* v. *McDaniel*, No. 3:02-cv-0342, 2008 WL 820088 (D. Nev. Mar. 24, 2008). Even in the cases cited by the States as presenting particularly egregious examples of "[c]ompetency litigation," the lengthiest delay was less than three years and, in any event, was not attributable solely to the incompetency claim. States Amicus Br. 7-9.

There is, in short, simply no evidence that the mere availability of these claims has resulted in "generating lengthy competency litigation ... across the nation." *Id.* at 2. That is hardly surprising in light of the judiciary's experience with claims under *Ford* v. *Wainwright*. While many predicted that those claims would overwhelm the federal courts, resulting in lengthy or indefinite delays of every execution, experience has shown that they are raised rarely and have caused no material disruption in the federal process or undue delays in execution. See *Panetti*, 551 U.S. at 934-935, 948-949 (noting that "a State 'should have substantial leeway to determine what process best balances the various interests at stake'" (quoting *Ford*, 477 U.S. at 427 (Powell, J., concurring))). The same is true of incompetency claims of the type at issue here as they are both infrequent and essential to guarantee the integrity of habeas proceedings. They should and must be available to address the few true cases of incompetence.

Chamblee, *Time for a Legislative Change: Florida's Stagnant Standard Governing Competency for Execution*, 31 Fla. St. U.L. Rev. 335, 363-367 (2004).

III. A STAY WAS PROPERLY ENTERED IN THIS CASE.

Under the standard set forth above — the same applied by the court of appeals — a stay of proceedings was plainly appropriate in this case.

1. The court of appeals properly concluded that a temporary stay should issue pending a determination of competency by the district court. Moreover, on the current record, the State cannot seriously contest that Mr. Gonzales was "incompetent" and unable to communicate rationally with his counsel. A neutral psychiatric expert from the State hospital, tasked with conducting an extended evaluation of Mr. Gonzales, concluded that Mr. Gonzales "has a 'genuine psychotic disorder' and is 'currently unable to communicate rationally for any extended period of time, such as would be required by a legal proceeding.'" Pet. App. C5. The district court itself, although it did not make a formal finding of incompetence (because it incorrectly concluded that it lacked discretion to grant the stay in any event), assumed in the proceedings below that Mr. Gonzales was in fact incompetent, and in a submission to the court of appeals described the "consensus" opinion of reviewing psychiatrists (albeit "tentative") as "that in the absence of medication [Mr. Gonzales] was largely incapable of communicating rationally with counsel." See Pet. App. B6. Notably, neither the State nor the Solicitor General argues to the contrary.[20]

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[20] While the district court did note that "the record indicate[s] [that Mr.] Gonzales possesses a limited capacity for rational communication[s,]" U.S. Br. 6 (citing App. C28 n.14), these flashes of coherence were temporary in nature and were not deemed sufficient to render him "competent" as a general matter or, more specifically, capable of communicating with his counsel. *See* Pet. App. C6; *cf. Holmes* v. *Buss*, 506 F.3d 576, 581 (7th Cir.

Thus, the record in this case strongly supports the lower court's determination that at least a *prima facie* showing in this regard had been made. Particularly given the dearth of contrary evidence or argument on this point, the court of appeals properly concluded that Mr. Gonzales should for that reason be presumed incompetent on appeal, pending further proceedings before the district court.

2. Communication between Mr. Gonzales and his attorneys was also properly deemed essential by the court of appeals. Mr. Gonzales's counsel in the federal habeas proceeding, who had not previously represented him, could not be expected to fully assess the merits of Mr. Gonzales's claims for relief based solely on the cold record, and without his participation. Nor was there any person with whom they might have consulted to gain insights into his perspective or any additional information he might have had. Mr. Gonzales "had eleven different attorneys over the course of his trial and sentencing, and was self-represented for part of that time." Pet. App. A5. Thus, there was no individual — other than Mr. Gonzales himself — who would be expected to have a thorough and complete understanding of the factual issues relevant to the claims. Cf. *Holmes* v. *Buss*, 506 F.3d 576, 580 (7th Cir. 2007) ("The petitioner was at his trial; his current lawyers were not. He may — if mentally competent — be able to convey to his lawyers a better sense of the alleged misbehavior of the prosecutor and of defense counsel than the trial transcript or other documentation provide.").

2007) ("There are lucid intervals in the petitioner's responses to the judge's questions, but there are also wild and whirling words, which the judge seems to have ignored.").

Direct communication with Mr. Gonzales is particularly necessary with respect to his claim of judicial bias, a serious claim that implicates due process and, if successful, constitutes a structural error affecting the entire proceeding.[21] While the factual predicate of that claim is grounded in statements made by the state court judge on the record, that transcript does not and cannot reflect other aspects of the proceedings — for example, the conduct of prosecutors and the judge, and their off-the-record remarks — that would also bear on the claim. This information is highly relevant in this case, and perhaps pivotal, given the ambiguous reference to an "indication" in the state record that the judge was "antagonistic" to Mr. Gonzales throughout those proceedings. See Pet. App. C10-C13.

Even the prosecutor in Mr. Gonzales's trial acknowledged that "there is some type of attitude problem between Judge Howe and the defendant. I'm not sure why it started, how it started or what effect it has had on this trial. Every time we appear in court, they snap and snarl at each other." Pet. App. C-11. Mr. Gonzales's current counsel have no way to obtain corroborative or other crucial information other than through their client. This fact alone is sufficient to establish, as other courts have recognized in similar situations, see, *e.g.*, *Holmes*, 506

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[21] *See, e.g.*, *Sullivan* v. *Louisiana*, 508 U.S. 275, 283 (1993) (distinguishing an instructional error from "[structural] errors such as judicial bias or denial of counsel" (modifications in original) (quoting *Rose* v. *Clark*, 478 U.S. 570, 579 n.7 (1986))); *Tumey* v. *Ohio*, 273 U.S. 510, 514-15 (1927).

F.3d at 579-80, that client communication is essential to full and fair adjudication of the habeas petition.[22]

Apart from a single, unsupported assertion that client communication was not essential in this case, neither the State nor the Solicitor General offers any real argument on this point or any reasoned explanation for why the court of appeals was incorrect in its analysis. Instead, both attempt to mischaracterize the opinion below, arguing that the decision was "based on speculation" and that communication need only "potentially benefit" counsel. Pet. Br. 20; U.S. Br. 31. But this ignores what the panel actually held: "communication with [Gonzales] is *essential* to counsel's ability to meaningfully prosecute Gonzales's habeas claims." Pet. App. A5 (internal quotation marks omitted, emphasis added); see also *id.* ("counsel may ... *need* to communicate with [Gonzales] to understand fully the significance and context of key facts") (internal quotation marks omitted, emphasis added). Notwithstanding their bald assertions that this conclusion was error, the State and the Solicitor General offer no basis to disturb it.[23]

3. No other factors identified by the district court militated against entry of a stay. The district court did not find, for instance, that Mr. Gonzales had somehow abused the habeas process. To deny a stay in this situation — where all relevant considerations

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[22] Indeed, because these claims may depend on information outside the existing record, they cannot properly be described as "record-based," and a stay would be appropriate even under the standard suggested by the Solicitor General.

[23] In earlier proceedings in this case, the State acknowledged that "obviously there are some [issues] that [counsel] need Mr. Gonzales to answer." *See* Resp. Br. in Opp. 2 n.1.

point in favor of a stay — would necessarily have constituted an abuse of discretion, as the court of appeals recognized.

Indeed, the district court expressly refused to exercise its discretion at all. It concluded, rather, that a stay is "categorically unavailable" (Pet. App. A5) when a capital habeas petitioner's claim may be described as "record-based" or "resolvable as a matter of law." Pet. App. A2. That conclusion, as discussed earlier, reflects a material misunderstanding of the statutory discretion committed to courts to stay habeas proceedings and of the standard on which that discretion should be exercised — *i.e.*, the "essential communication" standard. "Had the district court undertaken the [proper] ... inquiry," the court of appeals correctly noted, it "would have been compelled to conclude that 'communication with [Gonzales] is essential to counsel's ability to meaningfully prosecute' Gonzales's habeas claims." Pet. App. A5 (modification in original) (internal citation omitted).

This case squarely presents the rare circumstance where a capital habeas petitioner's inability to communicate deprives counsel of a meaningful opportunity to present the case. Because such communication is essential to fair adjudication of at least one of Mr. Gonzales's claims, moving forward with the proceedings despite the current breakdown in communication would frustrate the intent of Congress under 18 U.S.C. § 3599, jeopardize fulfillment of counsel's fundamental professional ethics obligations, and undermine the integrity of the federal habeas process. A temporary stay was

appropriately directed by the court of appeals, and that decision should be affirmed.[24]

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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[24] If the Court agrees with the "essential communication" standard, but cannot adopt the Ninth Circuit's analysis under that standard, the Court should vacate the judgment below with instructions to remand to the district court. The district court indisputably did not apply the proper standard in assessing the stay request and should decide in the first instance whether, as an appropriate exercise of its discretion, a stay is warranted under that standard.

REPLY BRIEF

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In The Supreme Court of the United States

CHARLES L. RYAN, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

ERNEST VALENCIA GONZALES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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REPLY OF THE PETITIONER

Respondent Gonzales's Brief in Opposition abandons the rationale proffered by the Ninth Circuit that 18 U.S.C. § 3599 implicitly guarantees the right of competence to assist counsel. Gonzales instead posits that 28 U.S.C. § 2251, a statute not addressed by the Ninth Circuit and that simply provides that a district court has discretionary authority to (temporarily) stay *state court* proceedings, justifies the Ninth Circuit's conclusion that the district court erred by rejecting Gonzales's request to indefinitely stay his federal habeas proceedings.[1]

Gonzales's abandonment of the Ninth Circuit's rationale is understandable because the court of appeals' reasoning does not withstand scrutiny. Section 3599 does not address or otherwise provide for the inmate's competence to assist counsel. When the words in a statute are unambiguous, further judicial inquiry is unnecessary. Congress says in the statute what it means. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

Furthermore, the Ninth Circuit's holding, that pursuant to § 3599, a stay must issue where the petitioner is not competent to assist counsel and

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[1] The Ninth Circuit relied entirely on 18 U.S.C. § 3599, but Gonzales now asserts that interpretation of § 3599 "is not the question presented in this case." Gonzales Br. 13. Again, at page 17, n.9, Gonzales argues that the authority to issue a stay "derives not from § 3599 but from § 2251. . . ."

communication by the prisoner "could potentially benefit" counsel, is directly contrary to this Court's decision in *Cullen v. Pinholster*, 563 U.S. ___, 131 S. Ct. 1388, 1398 (2011), when the merits of the claims were addressed in state court. In *Pinholster*, this Court held that "the record under review is limited to the record in existence at that same time *i.e.*, the record before the state court." 131 S. Ct. at 1398.

If the record under review is limited to the record before the state court, there is no possible way that the state prisoner's communication with counsel could be essential to counsel's ability to meaningfully prosecute the claim. If there is something in the record before the State Court to support the claim, counsel will be able to read that in the record. Counsel is more capable of doing that than the state prisoner. Gonzales states that the defendant can help counsel in "scouring the record." Gonzales Br. 12. Counsel does not need the state prisoner's help in "scouring the record." Counsel can read the record.

On the other hand, if the state prisoner's ability to communicate with counsel is alleged to be essential because the prisoner knows of something not in the record that supports the claim, that is irrelevant, because the record under review is limited to the record before the state court. There are two exceptions, which are not applicable here, where there can be an evidentiary hearing in Federal District Court, as set forth in 28 U.S.C. § 2254(e)(2). These are (i) a new retroactive ruling by this Court; (ii) a factual

predicate that could not have been discovered through the exercise of due diligence. Here, the District Court analyzed Gonzales's claims in detail, and found they were all known to him prior to the state post conviction proceeding and that on the main claim (judicial bias) "the record regarding this claim is complete." (Pet. App. C14.)

Gonzales's misunderstanding is clear in his discussion of the specifics of this case: "the claims of judicial bias could not be fully assessed without information and insights from the trial environment, including *off-the-record* events and exchanges, that only Mr. Gonzales could offer." Gonzales Br. 7 (emphasis added). "Off-the-record events and exchanges" cannot be part of the claim, because the claim is limited to "the record before the State Court."

In fact, the Ninth Circuit recognized that a capital habeas claim was "necessarily confined to the record," but reached the illogical conclusion that the claim could still benefit from communication between client and counsel. Citing its prior decision in *Nash v. Ryan*, 581 F.3d 1048, 1050 (9th Cir. 2009), the Ninth Circuit noted that it had previously held that "the prosecution of a capital habeas appeal, *which is necessarily confined to the record*, could benefit from communication between client and counsel." (Emphasis added.)

The Ninth Circuit drew the illogical conclusion that even though the claim is "necessarily confined to the record," communication between the defendant

and the attorney could still be essential. If "off-the-record events and exchanges" are excluded, because the claim is limited to "the record before the State Court," then the lawyer is perfectly capable of reading that record, and communications from the defendant are irrelevant.

The Ninth Circuit's ruling conflicts with this Court's "next-friend" jurisprudence, which recognizes that habeas cases can proceed notwithstanding the mental incapacity of petitioners. *See Whitmore v. Arkansas*, 495 U.S. 149 (1990). Additionally, the Ninth Circuit's ruling thwarts Congressional intent as evidenced by the Antiterrorism, and effective Death Penalty Act of 1996 (AEDPA), which was enacted to reduce delay in capital cases and to mandate greater deference to state court decisions.

Gonzales's reliance on § 2251 is unavailing. Section 2251, which is entitled "Stay of State Court Proceedings," authorizes the federal courts to stay *state court* proceedings during resolution of pending federal § 2254 proceedings or a pending request for appointment of counsel under § 3599(a)(2). Even if § 2251 applied to a federal court proceeding that would simply mean that in the appropriate case the federal court could stay proceedings (which it has general power to do in any case), but that fact does not answer whether such a stay is appropriate. It should not be appropriate based on incompetence of the state prisoner to help counsel, where the appeal is record-based, and the lawyer can read the record.

Gonzales fails to recognize that this case involves a *civil* proceeding that *he initiated*. A petitioner who initiates federal habeas review should pursue relief based on claims of which he and his counsel are aware: it should be dismissed if the basis for the petition is mere speculation regarding claims of which the petitioner and his counsel are currently unaware. If an incompetent petitioner regains competence and is able to provide additional relevant information, he can seek leave to amend his petition. Thus, a stay is not warranted based on a habeas petitioner's incompetence.

Finally, even assuming a *temporary* discretionary stay could be justified in some context based on the inmate's incompetence, such a stay would not be appropriate in this case because, as the district court correctly concluded, the claims at issue are record-based. Gonzales's input is clearly not essential to address claims for which there has been a merits ruling in state court and for which further evidentiary development is precluded.

ARGUMENTS

I. 18 U.S.C. § 3599(a)(2) DOES NOT REQUIRE THAT AN INDIGENT FEDERAL HABEAS CORPUS PETITIONER BE COMPETENT TO ASSIST COUNSEL.

Gonzales makes little effort to justify the Ninth Circuit's holding that § 3599 requires that an indigent

federal habeas corpus petitioner be competent to assist counsel. In fact, notwithstanding the Ninth Circuit's reliance on § 3599 as creating a right to be competent to assist counsel, Gonzales asserts that the interpretation of § 3599 "is not the question presented in this case," and that "[t]he issue is whether courts have authority to issue a stay, not whether capital habeas petitioners enjoy a freestanding 'right to competence,' or what the contours of such a right may be." Gonzales Br. 13.

Relying on *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003), and *Nash*, the Ninth Circuit held in the instant case that an indigent capital prisoner has a "*statutory right* to competence in his federal habeas proceedings." Pet. App. A2.

Gonzales's only attempt to incorporate the Ninth Circuit's analysis of § 3599 as creating a statutory right to be competent to assist counsel is his assertion that "it is eminently reasonable to construe the statutory provision for counsel in 18 U.S.C. § 3599 as warranting a stay of proceedings when the capital habeas petitioner's incompetence renders communication impossible." Gonzales Br. 17. But where the statute is not ambiguous, the court will not add provisions. *Connecticut Nat. Bank*, 503 U.S. at 254.

Gonzales's retreat from the Ninth Circuit's rationale is understandable, because the Ninth Circuit's ruling does not withstand scrutiny. The text of § 3599 does not support the Ninth Circuit's ruling. If Congress had intended for § 3599 to create a right to be

competent to assist counsel in the federal habeas context, it would have said so expressly.

Gonzales posits that § 3599 should be considered in light of the common-law understanding that a client must be competent to assist counsel. Gonzales Br. 16-17. But that common-law precept is more appropriately applied to trial proceedings that occur before a defendant's conviction becomes final. The common law did not include a right to an appeal or to federal collateral review, which is a proceeding beyond what was necessary law to protect a defendant's rights to due process.

Furthermore, this Court adopted a standard for competence to be executed that does not include a right to competence to assist counsel. This Court's decision in *Ford v. Wainwright*, 477 U.S. 399 (1986), requires only that the prisoner be aware "of the punishment [he is] about to suffer and why [he is] to suffer it," not that he be "able to assist in his own defense." *See id.* at 422 n.3 (Powell, J., concurring in part and concurring in the judgment) (noting that the "prevailing test" in the States did not require competence to assist counsel as a prerequisite to carrying out a death sentence).

The *Ford* standard would be rendered meaningless if a capital prisoner has a right to be competent to assist counsel. That is because inmates would presumably be entitled to be competent to assist counsel in arguing that he is *Ford* incompetent. That would automatically change the *Ford* standard from being

aware "of the punishment [he is] about to suffer and why [he is] to suffer," to he is "able to assist in his own defense." The *Ford* standard was in place when Congress enacted § 3599 (in 1988), yet Congress gave no indication that it was legislatively overruling *Ford* or otherwise attempting to preempt the field in the area of competence to be executed. Accordingly, § 3599 should not be interpreted to require competency to assist counsel.

II. GONZALES'S ALTERNATIVE GROUNDS FOR UPHOLDING THE NINTH CIRCUIT'S RULING ARE UNPERSUASIVE.

Gonzales relies on § 2251 as providing the district courts with the authority to stay capital § 2254 proceedings. Gonzales Br. 10, 13-15, 17 n.9, 18, 28. This reliance on § 2251 as authority to indefinitely stay his federal habeas proceedings is puzzling because § 2251, which is entitled "Stay of State court proceedings," expressly relates to state court, rather than federal habeas, proceedings.[2] The text of the statute grants federal courts the power to "stay any proceeding *against the person detained in any State court or by or under the authority of any State* for any matter involved in the habeas corpus proceeding." 28 U.S.C. § 2251(a)(1) (emphasis added). Notably, neither the Ninth Circuit nor Respondent Carter cited to

[2] The entire text of 28 U.S.C. § 2251 is contained in the Appendix to this Reply.

§ 2251 or otherwise suggested that it provides a rationale for indefinitely staying federal habeas proceedings when a state prisoner is incompetent to assist counsel.

Moreover, post-AEDPA amendments to § 2251 *reduced* the federal courts' authority to stay even state court proceedings. In 1994, this Court held that § 2251 provided jurisdiction for the federal courts to stay state court proceedings once a capital prisoner invoked his statutory right to appointed counsel. *McFarland v. Scott*, 512 U.S. 849, 858 (1994). In 2006, Congress amended § 2251 to permit only a 90-day stay of state proceedings upon appointment of counsel for a capital prisoner. PL 109-177, March 9, 2006, 120 Stat. 192 amending 28 U.S.C. § 2251(b)(2)(3). Congress also altered the holding of *McFarland*, adding that "[f]or purposes of this section, a habeas corpus proceeding is not pending until the application is filed." 28 U.S.C. § 2251(a)(2). Thus, unless a habeas application is filed within 90 days of the appointment of capital counsel, the federal courts are without jurisdiction to stay the state-court proceedings. Gonzales's reliance on § 2251 as authority for staying his federal proceeding is misplaced.

Gonzales posits that "[f]ederal courts indisputably have discretion to stay proceedings related to a pending petition for writ of habeas corpus, including a state sentence of death." Gonzales Br. 13 (citing *Rhines v. Weber*, 544 U.S. 269, 275 (2005)). Although the State agrees that federal courts generally have inherent equitable authority to temporarily stay

cases on their docket, that fact is not relevant to whether an inmate's incompetence to assist counsel is an appropriate basis for a stay. Exercise of authority to grant a stay must be a "proper exercise of their discretion." *Rhines*, 544 U.S. at 276. What constitutes a proper exercise of discretion is the issue before this Court, not whether district courts have general authority to grant stays.

The Brief for Petitioner notes that § 3359 could not have implied a right to competence, because this would have granted an important right to state prisoners that was not available to those who could not pay for their own attorney. Ryan Br. 15. Gonzales argued that the relevant statute was not § 3359 but § 2251. Since this analysis shows § 2251 is not relevant, the argument in Petitioner's brief remains unrefuted.

Gonzales's argument about district court discretion is ironic because the district court *denied* his request for a stay in a carefully detailed ruling explaining why (even assuming there is a right to competence to assist counsel) a stay is not appropriate in this case. (Pet. App. B and C.) The Ninth Circuit did not take issue with the factual findings of the district court that Gonzales's remaining claims are record-based and instead found a statutory (§ 3359) basis for a right to be competent to assist counsel, even in a record-based review. Therefore, to the extent this case is viewed through the lens of an abuse of discretion standard, the district court's ruling, rather than that of the Ninth Circuit, should be upheld.

Moreover, Gonzales's argument that the federal courts' general authority to issue stays justifies the Ninth Circuit's ruling fails because stays of habeas petitions filed under AEDPA must "be compatible with AEDPA's purposes." Those purposes include "reduc[ing] delays in the execution of state and federal criminal sentences, particularly in capital cases," (citation and internal quotation marks omitted), and "[furthering] the principles of comity, finality, and federalism," *Woodford v. Garceau*, 538 U.S. 202, 206 (2003); *see also Rhines*, 544 U.S. at 277 ("Even where stay and abeyance is appropriate, the district court's discretion in structuring the stay is limited by the timeliness concerns reflected in AEDPA.").

Gonzales unpersuasively urges that "[a] stay of proceedings in these circumstances is, moreover, fully consistent with AEDPA." Gonzales Br. 18. An indefinite stay pending restoration of competency, however, is clearly inconsistent with AEDPA's purposes and thwarts, rather than furthers, principles of comity, finality, and federalism.

Gonzales makes little effort to reconcile the Ninth Circuit's ruling with the clear limits on extra-record information this Court has reiterated in *Pinholster*:

> "This backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time i.e., the record before the state court."

131 S. Ct. at 1398.

Gonzales asserts that, because evidentiary hearings are available under limited circumstances, client input remains significant, *Pinholster* notwithstanding. Gonzales Br. 25. He also posits that "the decision whether to seek an evidentiary hearing in the first place – and thus whether a claim can fairly be called 'record-based' – cannot always be made in a vacuum, without a full picture of what the client knows." *Id.* at 24.

Gonzales's argument fails because a speculative assertion that an evidentiary hearing *might be* warranted based on as yet *unknown* information could be made in almost every case. A stay based solely on the inmate's inability to assist counsel makes no more sense than a stay based on the possible testimony of an unavailable third-party witness, which would clearly be inappropriate.

Even the American Bar Association Amicus Brief, filed in support of Respondents Gonzales and Carter, admits that the default rule is that the habeas proceeding should go forward even though the petitioner is incompetent, unless the petitioner makes a "*particularized showing*" (emphasis added) that the petitioner's competence is relevant:

> Many issues raised in collateral proceedings *can be adjudicated without the prisoner's participation*, and these matters *should be litigated according to customary practice*. However, collateral proceedings should be suspended if the prisoner's counsel makes a *substantial and particularized showing*

> that the prisoner's impairments would prevent a fair and accurate resolution of specific claims.

ABA Br. 15 (quoting ABA Task Force at 674) (citing, *inter alia, Council v. Catoe*, 359 S.C. 120, 597 S.E.2d 782, 787 (2004)); *Catoe*, 597 S.E.2d at 787 ("*[T]he default rule is that [post-conviction review] hearings must proceed even though a petitioner is incompetent. . . .*").

Under 28 U.S.C. § 2254, federal habeas review is generally a record-based review of state court proceedings that took place while an inmate was competent.[3] Contrary to Respondent's assertion, an inmate's competence while pursuing federal review of state-court proceedings does not implicate the due process concerns present during trial, and is not necessary to provide meaningful review.

Finally, Gonzales's assertion that competence to assist counsel is essential in pursuing habeas relief ignores that a federal habeas proceeding is an optional proceeding *initiated by the inmate*, presumably based on information and claims available at the time the proceeding is initiated. In fact, an application for federal habeas relief under § 2254, although a civil

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[3] Gonzales asserts that the Arizona courts ruled that Gonzales did not have a right to be competent during post-conviction proceedings. That ruling, however, addressed only Gonzales's right to be competent during *successive* post-conviction proceedings. Pet. App. B3-B4.

proceeding in nature, is significantly different from a normal civil Complaint. Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, the Plaintiff needs only allege a "short and plain statement of the claim showing that the pleader is entitled to relief." In contrast, the state prisoner in an action under § 2254 must "specify all the grounds for relief available to the petitioner" and must "state *the facts supporting* each ground." R. Gov. Habeas Corpus Cases 2(c) (emphasis added); *see also Mayle v. Felix*, 545 U.S. 644, 649 (2005).

Thus, if the necessary factual information is not currently available, such information cannot provide a basis for relief and is not necessary to resolve properly-asserted claims. Moreover, there is no injustice in requiring the inmate to go forward with proceedings *he initiated* because, if information develops at some point after the petition has been filed, the petition can be amended if the information "relates back" to previously asserted claims. *See Mayle*, 545 U.S. at 646-47; Fed. R. Civ. P. 15(c)(2).

Because federal habeas proceedings are optional proceedings initiated by an inmate seeking relief from a presumptively valid state court conviction and sentence, Gonzales's speculative assertion that an evidentiary hearing *may* be required simply does not justify a stay pending restoration of competency. As the Seventh Circuit observed, it is "odd to think that someone who initiates a [federal habeas] proceeding can then freeze it by claiming to be mentally

incompetent." *Holmes v. Buss*, 506 F.3d 576, 578 (7th Cir. 2007).

A. The Ninth Circuit's And Gonzales's Proposed Rule Is Untenable And Creates An Incentive For Inmates To Decline To Cooperate With Counsel.

The Ninth Circuit's holding – that a capital habeas proceeding can be indefinitely stayed pending an inmate's restoration to competency if there are claims that "could potentially benefit" from the inmate's input, even in a record-based review – is untenable, particularly as applied by the Ninth Circuit. The circuit court's application of that standard to review of record-based claims demonstrates the standard's implausibility. In fact, under the Ninth Circuit's rationale, almost every case would be subject to an indefinite stay any time a habeas petitioner is found to be incompetent to assist counsel, which would clearly be incompatible with the dictates of AEDPA.

Gonzales urges a more restrictive standard than that employed by the Ninth Circuit and suggests that district courts be ordered to employ an "essential communication" standard in deciding whether a stay is appropriate.[4] Gonzales Br. 13, 21. Gonzales further

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[4] Gonzales repeatedly asserts that the Ninth Circuit employed the "essential communication" standard in this case and in *Nash*. However, while the Ninth Circuit referenced such a standard, a careful reading of the opinion reveals that the Court

(Continued on following page)

suggests that the stay at issue here is "temporary" and the State's concerns are addressed to a certain extent because "courts monitor petitioners under these stays through periodic status reports and (in appropriate cases) treatment directives." *Id.*

Preliminarily, Gonzales's characterization of the stay as "temporary" ignores that he has *refused to take medication* that might restore him to competency. His refusal to take prescribed medication makes it highly unlikely that a stay based on his incompetence will be "temporary," and his case is more likely to be "consigned to habeas corpus limbo," possibly indefinitely. *See Holmes v. Levenhagen*, 600 F.3d 756, 762 (7th Cir. 2010).

Gonzales's "essential communication" standard – as he applies it – is similarly untenable to the extent it is viewed to require a stay of proceedings initiated by a habeas petitioner, when such a stay is predicated on a speculative claim that unknown information may lead to a colorable claim for relief. Gonzales's standard, like that employed by the Ninth Circuit, would result in indefinite stays in almost every case in which the petitioner is incompetent to assist counsel, and in fact creates an incentive for an inmate to exaggerate symptoms of incompetence and, if found to be incompetent, to refuse to take medication that might assist in restoring competency.

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decided the case under the "potentially beneficial" standard. Pet. App. A2-A6.

Gonzales argues that "communication with counsel may still be essential to the presentation of a capital habeas petitioner's claims in at least two ways." Gonzales Br. 24. First he contends that the inmate may have non-record information that "bears on" the strength of the claims or the manner in which they should be presented. Second, he argues that "the fundamentals of the attorney-client relations" and "[r]ules of professional conduct obligate attorneys to consult broadly and frequently with their clients and expressly as to strategic and tactical matters." *Id.* 24, 26.

An analysis of the strength of the claims or the manner in which they should be presented does not, however, implicate the types of legal judgment calls that require client input – even at trial. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) (noting that it is "the superior ability of trained counsel in the examination into the record, research of the law, and marshalling arguments" that benefits the defendant). The strength of claims or the manner in which they should be presented turns on evidence and rulings that are in the record. Extra-record information cannot be said to be "essential" to this type of analysis.

The "fundamentals of the attorney-client relationship" similarly do not compel the conclusion that client input is "essential" to pursuing federal habeas relief. Arizona's ethical rules require "reasonable communication" with a client. *See* ER 1.4, Ariz. Sup. Ct. R. 42. As with the ABA Model Rules of Professional Conduct, the only client decisions that an attorney

must leave to a defendant are the decision to plead guilty, waive a jury trial, or testify. ER 1.2(a), Ariz. Sup. Ct. R. 42. *See also Jones*, 463 U.S. at 753 n.6 (noting that under the ABA Model Rules of Professional Conduct, "[i]n a criminal case, the lawyer shall abide by the client's decision, . . . as to a plea to be entered, whether to waive a jury trial, and whether the client will testify"). These types of decisions are not implicated in federal collateral review.

Under circumstances where a client's capacity to consider decisions concerning representation is diminished, an attorney's obligation is to maintain a normal client-lawyer relationship "as far as reasonably possible." ER 1.14(a), Ariz. Sup. Ct. R. 42. Where a client's diminished capacity may harm his case, the attorney is obligated to take "reasonably necessary protective action." ER 1.14(b), Ariz. Sup. Ct. R. 42. Consistent with that directive, an attorney representing a federal habeas petitioner who is incompetent to assist counsel can ethically pursue claims that have been initiated in the hopes of obtaining relief for the client. Given the context of non-mandatory federal habeas proceedings, a lawyer's ethical obligations are not implicated by acting reasonably based on the information that is currently available. An attorney's ethical obligations do not compel the conclusion that a federal habeas case cannot move forward when an inmate is incompetent to assist counsel; instead an attorney can act ethically by acting essentially as a "next-friend" pursuing relief on behalf of the client. *See Whitmore*, 495 U.S. at 152.

Gonzales rejects the suggestion that an attorney can act as a "next friend" because they lack "any pre-existing relationship." The case he relies on for this proposition, however, involved an attorney who was acting against the stated interests of a death row inmate who declared his wishes to waive all further legal proceedings. *Centobie v. Campbell*, 407 F.3d 1149 (11th Cir. 2005) (*per curiam*). In the normal habeas proceeding, the attorney is seeking to further the inmate's attempt to *obtain relief*.

B. There Is No Plausible Basis For Granting A Stay Even Under Gonzales's Proposed Standard.

Assuming there could be a situation in which a temporary stay is somehow warranted based on an inmate's incompetence to assist counsel, such a stay would not be appropriate in the instant case. As noted previously, the district court expressly found that Gonzales's remaining claims are "record-based and involved purely legal issues and therefore would not potentially benefit from his ability to communicate rationally with counsel." Pet. App. B7. The district court explained in particular why Gonzales's input was not necessary to resolve his judicial bias claim. *Id.* C10-26. The district court examined in detail each of the claims made by petitioner, claims number 9, 13, 17, 29, 30, and 34, and showed as to each claim that the record was complete, that the claim involved a pure legal issue, that there could be no newly discovered evidence because the petitioner was an

eyewitness to the events at issue, or the claims were withdrawn and were not before the court, and that no actual innocence claim had been raised. With respect to the judicial bias claim, that the Ninth Circuit relied on, the district court specifically found that "the record regarding this claim is complete," and supported that conclusion with a detailed analysis. *Id.* C14. The Ninth Circuit completely ignored that analysis by the district court, and asserted that "Gonzales has raised at least one claim [judicial bias] that could potentially benefit from rational communication with Counsel. . . ." *Id.* A6. The detailed analysis by the district court is far more persuasive than the bare conclusion by the Ninth Circuit.

The Ninth Circuit stated its holding as follows: "In *Nash* we held that the prosecution of a habeas appeal that is record-based and resolvable as a matter of law can benefit from communication between client and counsel," and that this requires an indefinite stay in a case where a client is not competent to aid counsel. Pet. App. A2. This Court should reject that illogical conclusion. If the record is "record based and resolvable as a matter of law" then counsel can read the transcript, and communication from the client is unnecessary.

Although Gonzales continues to assert that communication between Gonzales and his attorneys relating to this claim is "essential," his proffered rationale includes "the number of attorneys who previously represented him." The relevant inquiry on federal habeas review, however, does not turn on

information about the different attorneys who represented Gonzales, but rather on whether the Arizona Supreme Court properly applied controlling law as established by this Court – in this instance *Liteky v. United States*, 510 U.S. 540 (1994).[5] *See* 28 U.S.C. §§ 2254(d), 2254(e). And, because the state courts addressed Gonzales's judicial bias claim on the merits, under *Pinholster*, extra-record information is not relevant to the determination whether the Arizona courts properly applied *Liteky*.

This Court has long recognized that the criminal trial "is the 'main event' at which a defendant's rights are to be determined, and the Great Writ is an extraordinary remedy that should not be employed to 'relitigate state trials.'" *McFarland*, 512 U.S. at 859 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)). Even before the enactment of AEDPA, this Court acknowledged that when direct review of a criminal case comes to an end, "a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited." *Barefoot*, 463 U.S. at 887.

This Court has further noted that, in the post-conviction context, a balance of competing interests

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[5] Gonzales raised this claim in his habeas petition prior to any alleged inability to communicate with counsel. Moreover, he was represented by the same attorney, Morton Rivkind, at both of his state trials. (Doc. 47, at 3-5; *Gonzales v. Stewart*, CIV 99-2016-PHX-SMM (filed Nov. 3, 2000).

between the prisoner and the State "surely tips in favor of the State." *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 162 (2000) (discussing how the status of the defendant changes dramatically following the guilty verdict). Generally, by the time the state capital prisoner seeks federal habeas review, he has had opportunities for direct appeal as well as state post-conviction collateral review. And, it is undisputed that Congress's intended purpose in enacting AEDPA "was to reduce delays and promote finality" while allowing petitioners a fair opportunity for review of their federal claims. Gonzales Br. 18. Consistent with those dictates, an attorney representing an inmate who is incompetent to assist counsel can pursue relief on behalf of the client by acting as his attorney or "next-friend" to pursue claims that are presently available. If an incompetent inmate is restored to competency, he can seek leave to amend his federal habeas petition where appropriate.

CONCLUSION

The Ninth Circuit's opinion should be vacated, its stay lifted, and the case remanded to the district court to decide the merits of Gonzales's habeas petition.

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APPENDIX

§ 2251. Stay of State court proceedings

(a) In general. –

(1) Pending matters. – A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding *against the person detained in any State court* or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

(2) Matter not pending. – For purposes of this section, a habeas corpus proceeding is not pending until the application is filed.

(3) Application for appointment of counsel. – If a State prisoner sentenced to death applies for appointment of counsel pursuant to section 3599(a)(2) of title 18 in a court that would have jurisdiction to entertain a habeas corpus application regarding that sentence, that court may stay execution of the sentence of death, *but such stay shall terminate not later than 90 days after counsel is appointed* or the application for appointment of counsel is withdrawn or denied.

(b) No further proceedings. – After the granting of such a stay, any such *proceeding in any State court* or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as

valid as if no habeas corpus proceedings or appeal were pending.

(Emphasis added.)

SUPPLEMENTAL BRIEF

RECORD
AND
BRIEFS

No. 10-930

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

VS.

ERNEST VALENCIA GONZALES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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ARGUMENT

The United States Solicitor General agrees that the Ninth Circuit erred in reading 18 U.S.C. § 3599(a)(2) to create an affirmative statutory right to competency in a § 2254 habeas proceeding. And he agrees that recognition of such a right would be a "transformative step" that would "supersede" longstanding constitutional and state-law rules. SG Br. 12. The Solicitor General nevertheless argues that the Ninth Circuit's decision "does not warrant this Court's review at this time" because "no circuit conflict has developed, and the issue appears to have arisen infrequently." *Id.* at 17, 18. Alternatively, he argues that the pendency of *Martel v. Clair*, No. 10-1265 (argued Dec. 6, 2011), militates against a grant of certiorari. *Id.* at 19-21.

Neither of the Solicitor General's reservations should deter the Court from granting plenary review. First, as things stand, both the Ninth Circuit and the Sixth Circuit have wrongly created a new right that "allows habeas petitioners to prevent states from enforcing their judgments, potentially forever, on the grounds of a nonexistent right to competency in habeas proceedings." *Carter v. Bradshaw*, 644 F.3d 329, ___ (6th Cir. 2011) (Rogers, J., dissenting), *petition for cert. pending sub nom. Tibbals v. Carter*, No. 11-218 (filed Aug. 17, 2011). This Court has long recognized the States' strong sovereign interest in enforcing their capital sentences. Waiting for more courts of appeal to address the issue would allow that sovereign interest to continue to be undermined in the 10 death-penalty States in the Ninth and Sixth Circuits. The Solicitor

General's position also ignores the tremendous burden placed on States and federal district courts in conducting complex competency proceedings that are not required by law. Only this Court's intervention can remedy the situation.

Second, the pendency of *Martel v. Clair* does not justify denying the petition or delaying action on it. The Solicitor General does not suggest that the Court's decision in *Clair* will resolve the question presented; only that it "may shed light on the scope and meaning of the right to counsel under [§]3599." SG Br. 20. If it does, the parties can take that into account as they brief the important and distinct issue presented in this case.

A. The Solicitor General Agrees That The Ninth Circuit Erred In Holding That Capital Inmates Have A Right To Be Competent To Assist Counsel In Habeas Proceedings

The State argues that the plain language of § 3599 does not grant an indigent state prisoner under a sentence of death the right to be competent to assist counsel; that the Ninth Circuit erred in implying such a right based on the policies underlying the provision; and that the Ninth Circuit's construction of the provision conflicts with this Court's practice of allowing a "next friend" to pursue habeas cases on behalf of incompetent prisoners. The Solicitor General reached precisely the same conclusions.

The Solicitor General first finds that § 3599 "does not expressly create a right to be competent to

assist counsel in federal capital postconviction proceedings." *Id.* at 10. He next finds that the Ninth Circuit "erred in concluding that [§]3599 nevertheless implicitly guarantees an additional right to competence to assist counsel (and, in turn, a right for capital prisoners unable to meet that competency standard to stay their habeas proceedings)." *Id.* And, like the State, the Solicitor General notes that in the postconviction setting "courts have long recognized" that a habeas petition can be pursued by a "next friend" when a petitioner is unable to litigate his own case due to mental incapacity. *Id.* at 11.

The Solicitor General then goes further, reviewing the reasoning of the Ninth Circuit in this case and in "its seminal case recognizing the statutory right to competence to assist counsel in postconviction proceedings," *Rohan v. Woodford*, 334 F.3d 803 (9th Cir.), *cert. denied*, 540 U.S. 1069 (2003), and finding it faulty across the board. SG Br. 12-15. In particular, the Solicitor General explains that the common law does not support the right to competence on habeas; the constitutional avoidance doctrine is inapposite because this Court has held that habeas petitioners do not have a right to counsel under the Constitution; and *Rees v. Peyton*, 384 F.3d 312 (1966), "is not instructive on the meaning of [§]3599." *Id.* at 15.

To be sure, the Solicitor General also opines that Congress has not "entirely" withdrawn a district court's inherent authority "to grant discretionary stays of habeas proceedings, which would presumably include the authority to grant *limited* competency-related stays in *certain* circumstances." *Id.* at 8-9

(emphasis added); *see also id.* at 16-17. But the Solicitor General concludes that, "[e]ven assuming the district court could, consistent with AEDPA, grant a limited stay," the Ninth Circuit "had no warrant for ordering a stay" in this case because it "did not disturb the district court's finding that respondent's habeas claims were fully developed and could be litigated even if respondent were not competent to assist counsel." *Id.* at 17.

B. The Solicitor General Underestimates The Impact Of The Ninth Circuit's Decision On State Capital Habeas Cases

Postponing review until additional circuits have weighed in on the issue would serve little purpose and would inflict significant harm on the 10 death-penalty States in which capital petitioners have wrongly been granted a right to be competent to assist counsel. That purported right will indefinitely delay some capital cases and will delay by months and years many additional capital cases.

1. Presently, two circuits have created that "transformative" right. After the State filed its Reply in this case, the Sixth Circuit issued its decision in *Carter v. Bradshaw*, holding that this Court recognized in *Rees v. Payton* a statutory right to competence to assist counsel in capital habeas cases. Whereas the Ninth Circuit discovered that right in § 3599, the Sixth Circuit found it in 18 U.S.C. § 4241. 644 F.3d at 333-334. As the Solicitor General explains, however, § 4241 "does not apply to capital postconviction proceedings." SG Br. 10. Rather, by its express terms,

the provision authorizes competency hearings "[a]t any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence." And, of course, "[c]apital postconviction proceedings occur neither 'prior to the sentencing of the defendant' nor 'after the commencement of probation or supervised release.'" SG Br. 10. *See also Blair v. Martel*, 645 F.3d 1151, 1155 (9th Cir. 2011) (expressly rejecting §4241(a)'s applicability to a state-prisoner habeas case on the ground that "[b]y its own terms, §4241 does not apply unless a federal criminal defendant is on trial or is released on probation.").

The Solicitor General agrees that review of this case would allow the Court to correct the errors of both the Ninth and Sixth Circuits because such review "would allow the Court to address not only the *Rees* argument"—which, again, was virtually the sole basis for the Sixth Circuit's ruling, and was also relied on by the Ninth Circuit — "but the [§]3599 argument as well." SG Br. 19 n.3. Alternatively, the Court could grant certiorari in both this case and *Carter*. Either way, there is no denying that the Solicitor General's suggestion that this Court wait before stepping in will leave in place the wrongly recognized right to competence in both the Ninth and Sixth Circuits.

2. The Solicitor General proffers two reasons for its wait-until-later approach. The first is that there is no circuit conflict. That is true (putting to the side the Ninth Circuit's disagreement with the Sixth Circuit on whether §4241 creates the right to competence to assist

counsel). And it is, of course, true that one of the principal reasons this Court grants certiorari is to resolve conflicts among the circuits. But that is not the *only* reason why the Court grants certiorari. To the contrary, the Court has often granted certiorari because federal courts of appeal have improperly delayed the States' enforcement of their criminal judgments, particularly in capital cases. *See, e.g., Bell v. Thompson*, 545 U.S. 794 (2005) (holding that Sixth Circuit abused its discretion in capital case when, after this Court denied certiorari and a petition for rehearing, it withheld its mandate for more than five months without entering a formal order); *Calderon v. Thompson*, 523 U.S. 538 (1998) (Ninth Circuit abused its discretion when, after it had issued its mandate denying the writ of habeas corpus and just two days before Thompson's scheduled execution, the court recalled its mandate and granted habeas relief to Thompson); *see also Gomez v. District Court*, 503 U.S. 653 (1992) (*per curiam*) (granting application to vacate the stay of execution of death and noting "the State's strong interest in proceeding with its judgment").

Nor has this Court hesitated to grant certiorari, irrespective of the existence of a circuit conflict, when federal courts of appeal have wrongly granted habeas relief in capital and non-capital cases. *See, e.g., Smith v. Spisak*, 130 S. Ct. 676 (2010); *Knowles v. Mirzayance*, 556 U.S. 111 (2009); *Bobby v. Bies*, 556 U.S. 825 (2009); *Schriro v. Landrigan*, 550 U.S. 465 (2007); *Ayers v. Belmontes*, 549 U.S. 7 (2007). In addition, the Court often summarily reverses court of appeal decisions, again irrespective of circuit conflicts, based on those courts' failure to comply with the limits

imposed by AEDPA. *See, e.g., Hardy v. Cross*, 132 S. Ct. 490 (2011); *Bobby v. Dixon*, 132 S. Ct. 26 (2011); *Cavazos v. Smith*, 132 S. Ct. 2 (2011). Although circuit splits provide a basis for certiorari review, respect for the States' sovereignty and the States' interest in enforcing their criminal punishments, not merely circuit splits, necessitates this Court's review of lower court decisions.

Capital inmates in the States of Arizona, California, Idaho, Kentucky, Montana, Nevada, Ohio, Oregon, Tennessee, and Wyoming now have a ready tool for delaying their executions. By simply declaring they are incompetent to assist their postconviction counsel, inmates thereby force psychological evaluations to be conducted and hearings to be held on the issue. The worst that happens is, after a several-month or longer delay of proceedings, the district court declares them competent. And ideally, from the perspective of the inmate who initiated the habeas proceeding in the first place, he will be found incompetent, thereby delaying his execution indefinitely even if he is competent to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986).

These States should not have to wait to see what other federal courts of appeal have to say on the issue before this Court steps in and removes that unwarranted barrier to the enforcement of their criminal judgments.

3. The Solicitor General also posits that "it is not clear the question presented has . . . exceptional importance" because "[i]t appears that federal courts

have stayed very few habeas cases on competency grounds." SG Br. 19. Yet the problem created by the Ninth and Sixth Circuit opinions can be seen simply by looking at the recent cases in which this Court's review has been sought. Respondent Gonzales' habeas case has already been delayed by more than two years; respondent Bradshaw's habeas case has been delayed by six years. In *Blair v. Martel*, 645 F.3d 1151 (9th Cir. 2011), the competency proceedings have continued for more than 6 years and are still on-going. *See Blair v. Cullen*, 2010 WL 5563896, at *1-2 (C.D. Cal. 2010) (non-published).

In addition, as the Amicus Brief of 15 States points out (Br. 4), the Ninth Circuit's decision has "spawned competency litigation" across the country. For example, a Florida death row inmate claimed incompetency to assist counsel and delayed his habeas action by 20 months, *see Ferguson v. Sec. Dep't of Corrections*, 580 F.3d 1183 (11th Cir. 2009); a Missouri death row inmate instituted a competency proceeding that delayed his habeas case by more than two years, *see Clayton v. Roper*, 515 F.3d 784 (8th Cir.); a Utah death row inmate obtained a stay of his habeas action that has lasted for more than 2 years, *see Lafferty v. Turley*, No. 2:07-cv-00322 (D. Utah); and an Indiana death row inmate has indefinitely stayed his habeas proceeding, *see Holmes v. Buss*, 506 F.3d 576 (7th Cir. 2007). The State Amicus Brief cites still more examples of habeas courts holding competency hearings — and thereby delaying the proceedings — including six within the past few years from Arizona and California alone. State Amicus Br. 4-8 & n.2.

As is apparent from the delay discussed above, even in cases where an inmate is ultimately found to be competent, the process is time consuming and resource intensive that impose a tremendous burden on the states and the courts, as well as on crime victims. Yet, a competency proceeding can be initiated based on a relatively benign assertion that an inmate is not cooperating or otherwise assisting counsel.

The Solicitor General's somewhat cavalier position seems to be that even though the Ninth and Sixth Circuits clearly erred in finding a right to competency in federal habeas, the States should just accept it and the accompanying burden without recourse.

All told, the issue presented in the case has a greater impact on States' efforts to enforce their death sentences than the issues presented in virtually all of the cases cited on pages 6-7, *supra*. For Arizona — as well as for the other States in the Ninth and Sixth Circuits, and the additional States that joined the amicus brief — this case has "exceptional importance."

C. The Pendency Of *Martel v. Clair* Does Not Justify Denying Certiorari Or Delaying Action On The Petition

The Solicitor General also argues that it would be "premature" to grant certiorari in this case while *Martel v. Clair*, No. 10-1265 (argued Dec. 6, 2011), remains pending, and that the better course — to avoid "further delay" in this case — would be to deny certiorari. SG Br. 21. The Solicitor General is wrong

on both fronts: It would not be premature to grant certiorari before *Clair* is decided; and if the Court disagrees, the proper course is to await that decision before acting on the petition.

The most the Solicitor General can say about *Clair*'s relevance to this case is that it "may shed light on the scope and meaning of the right to counsel under [§]3599." SG Br. 20. True, but irrelevant. The question presented in *Martel* is "whether a condemned state prisoner in federal habeas corpus proceedings is entitled to replace his court-appointed counsel with another court-appointed lawyer just because he expresses dissatisfaction and alleges that his counsel was failing to pursue potentially important evidence." Pet. at i, *Clair*, *supra* (No. 10-1265). Resolution of that question will not answer whether § 3599 requires a capital prisoner's habeas petition to be halted based on a claim of incompetency or whether the Ninth and Sixth Circuits misread *Rees v. Payton*. To the extent Clair's discussion of § 3599 bears on the issue presented here, the parties can take that into account in their merits briefing.

If the Court nonetheless would prefer to wait till *Clair* is decided before acting on this petition, the State has no objection. But it is ironic, to say the least, that the Solicitor General suggests — in the interests of preventing "further delay" — that the better course is to deny certiorari than to await a decision in *Clair*. The most expeditious way of ending delay in capital cases would be for the Court to grant certiorari in this case and hold that no federal statute grants capital inmates a right to be competent to assist their postconviction

counsel. It is the Solicitor General's suggestion that the Court wait till "future opportunities" arise (Br. 19) — perhaps several years from now when a circuit split emerges — that will create substantial additional delay.

CONCLUSION

For the foregoing reasons and those stated in the petition and reply in support of the petition, the petition for a writ of certiorari should be granted.

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SUPPLEMENTAL BRIEF

No. 10-930

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Petitioner,

v.

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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ARGUMENT

I. Petitioners continue to ignore the capital prisoner's high burden and exaggerate potential impact of *Rohan* cases on capital habeas dockets.

Petitioners claim that "[b]y simply declaring they are incompetent to assist their post conviction counsel, [capital] prisoners thereby force psychological evaluations to be conducted and hearing to be held on this issue." (Supp. Br. p. 7.) Petitioners are wrong. Were this the case, capital prisoners would have surely flooded the habeas dockets with *Rohan* requests and subsequent hearings. *Rohan ex. rel. Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003) *cert denied*, 540 U.S. 1069 (2003). Petitioners' characterization of competency proceedings at the habeas stage ignores what happens in practice; that the *Rohan* competency holding is narrow in scope and the *Rohan* standard is demanding in its enforcement.

A federal habeas petitioner may *initially* move for a *Rohan* determination *only* if he raises claims which could benefit from his ability to rationally communicate information that is within his own private knowledge, *Rohan*, 334 F.3d at 818-19, or if his incompetence prevents him from rationally making an important decision which he alone can make. *See also Holmes v. Levenhagen (Holmes II)*, 600 F.3d 756, 762 (7th Cir. 2010). In addition, counsel for the capital prisoner must make a threshold colorable showing of

potential incompetence with his motion for determination of competency.[1]

Only after this threshold showing does the district court have the discretion to grant the prisoner's request for either a determination or a hearing.[2] Even if a hearing is granted, the district court is still the gatekeeper to a stay. Here, as in other competency settings the capital prisoner has the burden of proof. *See Cooper v. Oklahoma*, 517 U.S. 348, 355 (1996) (the government may presume the defendant is competent and require the defendant to shoulder the burden of proving incompetence); *Medina v. California*, 505 U.S. 437, 452 (1992) (allows states to place the burden of proof on a defendant in competency hearings that occur at any stage of the proceedings).

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[1] By way of example, in support of his *Rohan* motion in this matter, counsel for Mr. Gonzales filed 12 exhibits which included among other documents: 1) a declaration from counsel outlining observations and interactions with her client; 2) nonsensical and paranoid pleadings and letters by Mr. Gonzales; 3) a mental health report from a court-appointed psychiatrist finding Mr. Gonzales delusional; and 4) four additional mental health reports, all finding Mr. Gonzales psychotic and/or delusional. In one such report, the expert stated Mr. Gonzales was unable to understand the nature of the legal proceedings and further unable to assist counsel.

[2] *Rohan* competency is not required in cases where appointment of a next friend or guardian ad litem would adequately protect the petitioner's rights and interests. *See Rohan*, 334 F.3d at 816 (when grounds for relief are apparent even without a petitioner's assistance, a "next friend" or guardian is in the best interest of the petitioner).

Moreover, a district court may, as they often do, outright dismiss a request for a *Rohan* determination without evidentiary development of any type. *See Clayton v. Luebbers*, No. 4:02-cv-08001 (W.D. Mo. April 27, 2006); *Henry v. Ryan*, No. 2:02-cv-00656 (D. Ariz. Jan. 24, 2006); *Carpenter v. Ayers*, No. C 98-2444 (N.D. Cal. Dec. 2, 2008); *Mines* v. *Dretke*, No. 3:00-CV-2044 (N.D. Tex. Aug. 6, 2003); *Kirkpatrick v. Ayers*, No. CV 96-00351 (C.D. Cal. Nov. 13, 2009); *Cole v. Workman*, No. CIV-08-328 (N.D. Okla. Sept. 1, 2011); *Conner v. Florida Dep't of Corrections*, No. 1:07-cv-23009 (S.D. Fla. May 18, 2010); *Cummings v. Florida Dep't of Corrections*, (S.D. Fla. Aug. 8, 2007); *Gore v. Sec'y for the Dep't of Corrections*, (S.D. Fla. May 25, 2010); *Rodriguez v. McNeil*, No. 1:10-cv-22692 (S.D. Fla. Jan. 3, 2011).

The history of how the *Rohan* decision has been applied in the district courts is evidence the burden for claimants is a high one. In the almost *nine* years since the *Rohan* decision, Petitioners are able to point to only a few cases to support hyperbolic claims of chaos in the federal courts. Nothing can be further from the truth; the flood gates have not been opened.

Respondent has attempted to capture an accurate number of the affected cases. As can best be assessed from a search of all the district courts dockets nationally, less than 2% of all capital habeas cases in federal courts are currently stayed pursuant to a request for a *Rohan* determination.[3] The Solicitor

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[3] In October 2011, the Office of the Federal Defender, District of Arizona (FPD) created a CM/ECF query to locate all death penalty cases where claims of incompetency based on *Rohan* were alleged.

General is correct in his assertion that in the years since the original decision, "the [*Rohan*] issue appears to have arisen infrequently." (Solic. Gen. Br. 18.)

In fact, contrary to their position in this case, Petitioners have recently not only recognized the *Rohan* decision, but have embraced it and stipulated to a capital prisoner's incompetency, resulting in a stay. *See White v. Ryan*, No. CV 08-08139 (D. Ariz. Sep. 29, 2010.)

As Respondent set forth in his brief in opposition, a number of these cases involve stipulated stays.

This query was sent to all of the district and circuit court clerks. For any district that did not return a CM/ECF query result, FPD staff performed a PACER search of each docket individually. The cases cited as a result of the queries were individually evaluated for *Rohan* claims and those cases were summarized.

Any docket that did not have "competency," or one of the designated terms, in the pleading description section on PACER would not appear in the results. The results would also not include any case where a *Rohan* claim was initiated in a court. The results were measured against the most current available statistics to obtain the percentage above. *See* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/appendices/C03ASep10.pdf

II. Even the few cases cited by Petitioners in their supplemental brief do not support their argument claims of substantial harm.

A. The cases relied upon concern stays, not habeas grants.

Petitioners leap bounds beyond the scope of *Rohan*. As set forth above although *Rohan* stays are rare, indefinite stays are even more rare. For most of the cases cited, the delays are not significant and do not compromise state interests. In the only case cited illustrating an indefinite stay, *Holmes v. Buss (Holmes I)*, 506 F.3d 576 (7th Cir. 2007), the district court found the capital prisoner competent on remand, a result which was overturned again on appeal in *Holmes II*, 600 F.3d at 763. The court declined to appoint a guardian *ad litem* because the decision of whether to claim competence would be "exceedingly difficult" under the circumstances. *Id.* An indefinite stay is an atypical result, but even this extreme case did not result in a grant of habeas relief.

Furthermore, as stated above, in cases involving stays on competency grounds, a district court may appoint a next friend to litigate the habeas claims. Additionally, the prisoner may regain competence, whether as a result of medical treatment or simply due to the passage of time. Thus, the truly indefinite stay as above is highly unusual.

B. In the cases cited by Petitioners in their supplemental brief, and by *amici*, there were legitimate reasons to suspect incompetency, or other reasons for delay.

Capital prisoners who requested competency hearings in the cases cited by Petitioner were of legitimately uncertain competency. Evidence in the record and court decisions demonstrate that the ability of these prisoners to assist in their own defense was highly questionable. Therefore, their requests for competency hearings were legitimate measures to resolve open questions of fact, rather than mere delay tactics.

In *Holmes II*, Judge Posner found the petitioner seeking an incompetency ruling to be "deeply confused, obsessed, and delusional," based on defendant's own recent testimony. 600 F.3d at 762. Similarly, in *Ferguson v. Sec. for the Dep't of Corrections*, that petitioner testified that he had been placed in a mental hospital and diagnosed with schizophrenia, psychosis, and hallucinations over a period of several years. 580 F.3d 1183 (11th Cir. 2009). The district court found credible evidence that petitioner had at one point had a mental disorder that included symptoms indicating possible paranoid schizophrenia. *Id.* at 1221. In *Clayton v. Roper*, jail officials suspected petitioner's psychosis, and the prison staff psychologist concluded petitioner was likely incompetent to assist his attorney. 515 F.3d 784, 789 (8th Cir. 2008) *cert. denied*, 129 S. Ct. 507 (2008). Thus, the cases cited by Petitioner as an illustration of a system run amok feature evidence of genuine concerns about the competency of the habeas petitioners.

In one case cited by Petitioners, the capital prisoner received stays for a myriad of reasons, not simply due to claiming incompetence. *Blair v. Martel*, 645 F.3d 1151, 1153 (9th Cir. 2011) (Multiple rounds of habeas claims, based on grounds other than incompetence, were filed which cumulatively led to the delays in the proceedings.)

III. The Court's recent decision in *Martel v. Clair*, at minimum, signals the "interest of justice" standard is applicable regarding the attorney-client relationship at the habeas stage.

In his brief the Solicitor General suggested that the question presented in *Martel v. Clair*, pending before the Court, may illuminate the scope of 18 U.S.C. § 3599, the statute at the crux of this matter. Since the Solicitor General's filing, the Court decided *Martel v. Clair*, – S.Ct. –, 2012 WL 685759 (March 5, 2012).

This Court's reasoning in *Clair* reaffirms the signi[illegible]ance of counsel's role in capital representation, specifically as it relates to the attorney-client relationship.

The question before this Court was essentially whether district courts deciding substitution of counsel motions, brought pursuant to § 3599, should utilize an "in the interests of justice" standard, derived from 18 U.S.C. § 3006A, an appointment of counsel statute for non-capital litigation. *Clair*, 2012 WL 685759, at *7. This Court rejected the State's proposed higher standard for substitution of counsel of "actual or constructive denial" of counsel. *Id.*

In support of that decision, this Court set forth its belief that § 3599, "aims in multiple ways to improve the quality of the representation afforded to capital petitioners and defendants alike." *Clair*, 2012 WL 685759, at *7. The Court also reaffirmed that this statute "'reflects a determination that quality legal representation is necessary' in all capital proceeding to foster 'fundamental fairness in the imposition of the death penalty.'" *Clair*, 2012 WL 685759, at *7, citing *McFarland v. Scott*, 512 U.S. 849, 855, 859 (1994). The Court further acknowledges the "myriad ways that § 3599 seeks to promote effective representation for persons threatened with capital punishment." *Id.*

Although Petitioners infer that since there is no constitutional right to counsel in habeas, and as such no right to competency as implicated in the *Rohan* decision. (Pet. at 7.) In an analogous context, the Court rejected this position. *Clair*, 2012 WL 685759, at *9.

At minimum, the Court has signaled that an "interest of justice" standard is necessarily implicated with respect to these sorts of questions, i.e., the role of counsel in habeas proceedings. That being the case, if an "interest of justice standard" is applied to habeas competency matters, where the crux of the claim is the attorney-client relationship, it dictates that counsel should be able to meaningfully communicate with his client.

Clair thus encourages a broader reading of § 3699, rather than the cribbed reading offered by the Petitioner to justify going forward with executions, despite the capital prisoner's proven inability to assist counsel appointed under § 3599.

CONCLUSION

For the foregoing reasons, and those set for by the Solicitor General, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted this 14th day of March 2012.

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AMICUS CURIAE BRIEF

No. 10-930

In the Supreme Court of the United States

CHARLES L. RYAN, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS,
PETITIONER

v.

ERNEST VALENCIA GONZALES
(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether 18 U.S.C. 3599(a)(2), which provides that an indigent capital prisoner pursuing federal postconviction relief "shall be entitled to the appointment of one or more attorneys," entitles such a prisoner to a stay of his federal postconviction proceedings if he is not competent to assist his counsel.

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In the Supreme Court of the United States

No. 10-930

CHARLES L. RYAN, DIRECTOR
ARIZONA DEPARTMENT OF CORRECTIONS, PETITIONER

v.

ERNEST VALENCIA GONZALES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

Following a jury trial in Arizona state court, respondent was convicted of felony murder, aggravated assault, theft, armed robbery, and two counts of burglary. *State* v. *Gonzales*, 892 P.2d 838, 842-843 (Ariz. 1995), cert. denied, 516 U.S. 1052 (1996). He was sentenced to death on the murder count and to terms of imprisonment on the noncapital counts. *Ibid.* The convictions and sentences were affirmed on direct appeal; the state courts denied postconviction relief; and respondent filed a petition for federal habeas corpus relief in the United

States District Court for the District of Arizona. Pet. App. B3. His appointed counsel subsequently sought a competency hearing and a stay of the federal habeas proceedings on the ground that respondent was incompetent to assist counsel in the litigation of the case. *Id.* at B5, C2. The district court denied the motion. *Id.* at C1-C29. The court of appeals granted a writ of mandamus and ordered that the district court stay the proceedings pending a competency hearing. *Id.* at A1-A9.

1. In 1990, respondent stabbed to death Darrel Wagner, and severely injured Deborah Wagner, when the couple surprised respondent while he was burglarizing their home. *Gonzales*, 892 P.2d at 842. The State of Arizona tried respondent for felony murder and five other offenses. *Id.* at 842-843. Respondent's first trial ended in a hung jury. Pet. App. C10. Before retrial, respondent, acting pro se, moved to disqualify the trial judge. *Ibid.* Respondent claimed, based on adverse rulings and on-the-record comments from the first trial, that the trial judge was biased against him. *Ibid.* The motion was eventually referred to a different judge, who denied it. *Id.* at C10-C12.

Respondent's retrial resulted in a conviction on all counts. Pet. App. C12; *Gonzales*, 892 P.2d at 842-843. Before sentencing, respondent filed another motion to disqualify the trial judge. Pet. App. C12. A new judge (who was neither the trial judge nor the judge who ruled on the first disqualification motion) denied the motion. *Ibid.*

At sentencing, the trial court found two aggravating factors and no mitigating factors, and it imposed a sentence of death for the felony-murder conviction and various prison terms for the other crimes. *Gonzales*, 892 P.2d at 843. Respondent's appellate counsel raised sev-

eral issues on direct appeal, including the issue of judicial bias. *Ibid.* The Supreme Court of Arizona rejected the judicial-bias argument and affirmed. *Id.* at 843, 847-848. This Court denied certiorari. 516 U.S. 1052.

After the judgment became final, respondent sought state postconviction review. Pet. App. B3. His asserted grounds included, among other things, a claim of judicial bias. *Id.* at C15. The state courts denied relief. *Id.* at B3.

2. In 1999, respondent filed a petition for federal habeas corpus relief in the federal district court in Arizona. Pet. App. B3; see 28 U.S.C. 2254. The Office of the Federal Public Defender was appointed to represent him. Br. in Opp. 1. Since 1988, federal law has provided that in federal postconviction proceedings "seeking to vacate or set aside a death sentence" imposed by either a state or a federal court, "any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001(b), 102 Stat. 4393. The provision was originally codified at 21 U.S.C. 848(q)(4), but in 2006, it was moved, without material change, to 18 U.S.C. 3599(a)(2). Terrorist Death Penalty Enhancement Act of 2005, Pub. L. No. 109-177, § 222(a), 120 Stat. 231 (2006). Counsel's appointment covers not only the district-court proceedings, but also additional proceedings, including "applications for stays of execution and other appropriate motions and procedures," as well as "such competency proceedings and proceedings for executive and other clemency as may be available." 18 U.S.C. 3599(e).

In 2000, respondent filed a 237-page amended federal habeas petition raising 60 claims, including a judicial-bias claim. Pet. App. B3; see *id.* at C10. He thereafter withdrew 13 claims so that he could pursue them in state court. *Id.* at C2. His renewed motion for state postconviction relief included a claim that he was not competent to assist his postconviction counsel. *Id.* at B3. The state court rejected that competency claim as noncognizable. *Id.* at B3-B4.

3. a. In 2006, after the case had returned to federal court and shortly before respondent's opening merits brief was due, his counsel filed a motion for a competency determination and a stay. Pet. App. A2, B5. Counsel based the motion on *Rohan* v. *Woodford*, 334 F.3d 803 (9th Cir.), cert. denied, 540 U.S. 1069 (2003), in which the court of appeals had held that "where an incompetent capital habeas petitioner raises claims that could potentially benefit from his ability to communicate rationally, refusing to stay proceedings pending restoration of competence denies him [the] statutory right to assistance of counsel" currently codified at 18 U.S.C. 3599(a)(2). *Rohan*, 334 F.3d at 819; see Pet. App. B5. Counsel asserted that "due to a progressive deterioration in [respondent's] mental health he had lost the ability to rationally communicate with his counsel and assist them" and that respondent's "assistance was essential to a number of his remaining habeas claims." *Id.* at A3.

Based on counsel's representations, the district court permitted the parties to have mental health experts examine respondent. Pet. App. C3. The parties' psychiatrists reached conflicting conclusions. *Ibid.* Respondent's expert concluded that respondent was not competent to understand his current legal situation or to assist counsel and that there was a good chance he would re-

main incompetent even if medicated. *Id.* at C4. The State's expert concluded that respondent was competent and was faking his symptoms, noting that respondent had "verbalized his desire to be found incompetent[] (and thereby delay or avoid death by lethal gas)." *Id.* at C3-C4. The State's expert could not, however, exclude the possibility of a mental disorder, and she recommended a period of locked observation and, if the symptoms persisted, medication. *Id.* at C4.

On the State's motion, respondent was transferred to the Arizona State Hospital for further evaluation. Pet. App. C5. At the end of a 90-day assessment period, the supervising psychologist expressed reservations about whether respondent was malingering, but nonetheless concluded that respondent had a "genuine psychotic disorder" and was "currently unable to communicate rationally for any extended period of time, such as would be required by a legal proceeding." *Ibid.* The psychologist became convinced of the genuineness of respondent's symptoms after observing improvement when respondent was put on antipsychotic medication. *Ibid.* But the medication had been discontinued at respondent's request, after he complained of side effects including back pain and restlessness. *Id.* at B5-B6, C5.

b. After further briefing, the district court denied respondent's request for a stay and a competency determination. Pet. App. C29. The court concluded that respondent's potential incompetence did not entitle him to a stay of the habeas proceedings. *Id.* at C7-C29. The court reasoned that, unlike the ineffective-assistance-of-counsel claim that had been at issue in *Rohan*, respondent's "properly-exhausted claims are record-based and/or resolvable as a matter of law, irrespective of [his] capacity for rational communication with counsel." *Id.*

at C27-C28; see *id.* at C7-C27. With respect to respondent's judicial-bias claim in particular, the district court determined that respondent's counsel "are in a position to argue[] the merits of this claim without further input from" respondent. *Id.* at C16. The court observed that the record on the judicial-bias claim "is fully developed"; that "additional, relevant facts do not exist that are within [respondent's] private knowledge"; and that, in any event, respondent's failure to allege or prove such facts in state court precluded further factual development in federal court. *Ibid.* (citing, *inter alia*, 28 U.S.C. 2254(e)(2)).

Because the district court concluded that none of the exhausted claims could benefit from respondent's assistance, it did not need to reach the issue of whether respondent was, in fact, sufficiently competent or whether he could be medicated in order to make him so. See Pet. App. C6, C28-C29. The district court did note, however, that its "review of the record * * * shows that [respondent] possesses at least a limited capacity for rational communication," as he had "agree[d] to meet with mental health experts in support of his motion to determine competency and stay the proceedings" and "was at times able to communicate rationally" with the State's experts. *Id.* at C28 & n.14. The district court also noted that "the likelihood exists that [respondent's capacity for rational communication] can be maximized through the use of anti-psychotic medication." *Id.* at C28.

4. a. Respondent asked the court of appeals for an emergency stay of the district court proceedings and an emergency writ of mandamus. Pet. App. E1-E2. The court of appeals granted a temporary stay and ordered briefing. *Ibid.*; see *id.* at F1-F2 (denying reconsideration); *id.* at G1-G2 (amended order). It later stayed the

appellate proceedings pending its resolution of two cases that, it explained, "involve related issues that are likely to affect our decision in the present case." *Id.* at H2.

One of those related cases was eventually dismissed as moot. See Pet. 6 n.2. The other, *Nash* v. *Ryan*, 581 F.3d 1048 (9th Cir. 2009), cert. dismissed, 130 S. Ct. 1757 (2010), was decided several months later. In *Nash*, the court of appeals held that "the statutory right to competence in capital habeas cases that we recognized in *Rohan* applies to appeals," such that a prisoner "who lacks the ability to communicate rationally, and who seeks to raise claims on appeal that could potentially benefit from such communication is entitled to a stay of the appeal until [he] is found competent." *Id.* at 1055.

b. In October 2010, the court of appeals granted a writ of mandamus in this case, holding that respondent "is entitled to a stay pending a competency determination." Pet. App. A2; see *id.* at A9. The panel reasoned that "*Nash* squarely controls this case, foreclosing the district court's conclusion that a stay under *Rohan* is categorically unavailable when a capital habeas petitioner's claims consist only of record-based or legal questions." *Id.* at A5 (citing *Nash*, 581 F.3d at 1050). The proper "claim-specific inquiry," the panel stated, "'should be whether rational communication with the [prisoner] is essential to counsel's ability to meaningfully prosecute'" the claim. *Ibid.* (quoting *Nash*, 581 F.3d at 1054).

The court of appeals concluded that respondent's judicial-bias claim satisfied that test. The court noted that respondent "had eleven different attorneys over the course of his trial and sentencing, and was self-represented for part of that time." Pet. App. A5. Respondent's "claim of judicial bias," the court continued, "cen-

ters on events regarding which 'counsel may need to communicate with [respondent] to understand fully the significance and context' of key facts so that counsel can pursue the most persuasive arguments." *Ibid.* (quoting *Nash*, 581 F.3d at 1048) (internal alterations omitted).

DISCUSSION

This case does not warrant this Court's review at this time. Although the court of appeals took an overly broad view of the circumstances in which a competency-related stay is appropriate in a capital habeas proceeding, the question presented arises infrequently, and the decision in this case does not conflict with the decision of any other court of appeals. Additionally, resolution of the question presented may be affected by the Court's decision in another case this Term concerning 18 U.S.C. 3599, *Martel* v. *Clair*, No. 10-1265 (argued Dec. 6, 2011), which could illuminate the scope of the statute's protections. It would at the very least be premature to grant review in this case while *Clair* is still pending, and the interlocutory posture of the petition suggests that denying certiorari, rather than holding the petition for *Clair*, would be the most appropriate course.

I. SECTION 3599 NEITHER REQUIRES NOR CATEGORICALLY FORECLOSES COMPETENCY-RELATED STAYS

Petitioner contends (Pet. 7-19) that the court of appeals erred in construing Section 3599 to require an indefinite stay of a capital prisoner's federal habeas proceedings when the prisoner is not competent to assist his counsel. Petitioner is correct that neither Section 3599 nor any other provision of federal law affirmatively requires that result. At the same time, however, no federal statute entirely withdraws district courts' inherent authority to grant discretionary stays of habeas pro-

ceedings, which would presumably include the authority to grant limited competency-related stays in certain circumstances.

A. Section 3599 Does Not Guarantee A Right Of Competence To Assist Postconviction Counsel

1. This Court has never recognized a constitutional right to counsel during collateral review of a conviction or sentence. See, *e.g.*, *Coleman* v. *Thompson*, 501 U.S. 722, 752 (1991); *Lawrence* v. *Florida*, 549 U.S. 327, 336-337 (2007).[1] Congress, however, "created a statutory right to qualified legal representation for capital defendants in federal habeas corpus proceedings" when it enacted 18 U.S.C. 3599 (formerly 21 U.S.C. 848(e)). *McFarland* v. *Scott*, 512 U.S. 849, 851 (1994). Section 3599(a)(2) provides that "[i]n any post conviction proceeding under" 28 U.S.C. 2254 or 2255 "seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f)." Counsel appointed under the statute must generally meet certain experience requirements, 18 U.S.C. 3599(b)-(d), and will, unless replaced, represent the litigant throughout a variety of judicial and other proceedings, 18 U.S.C. 3599(e).

Section 3599 does not, however, expressly create a right to be competent to assist counsel in federal capital

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[1] The Court is currently considering whether the Constitution guarantees a right to counsel on collateral review when such review is the first opportunity for the prisoner to raise a particular claim of error. See *Martinez* v. *Ryan*, No. 10-1001 (argued Oct. 4, 2011).

postconviction proceedings. The only mention of "competency" in Section 3599 appears in the list of proceedings in which appointed counsel will represent the habeas applicant, which includes "such competency proceedings * * * as may be available." 18 U.S.C. 3599(e). But Section 3599 does not itself make "available" any new categories of "competency proceedings." And the federal statute governing competency determinations, 18 U.S.C. 4241, does not apply to capital postconviction proceedings. That statute permits a district court to grant a competency hearing, either *sua sponte* or at the request of either party, "[a]t any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence." 18 U.S.C. 4241(a). Capital postconviction proceedings occur neither "prior to the sentencing of the defendant" nor "after the commencement of probation or supervised release."

2. The court of appeals erred in concluding that Section 3599 nevertheless implicitly guarantees an additional right of competence to assist counsel (and, in turn, a right for capital prisoners unable to meet that competency standard to stay their habeas proceedings). Even at trial, the right to counsel (which is guaranteed by the Sixth Amendment) and the right to competency (which is guaranteed as part of a criminal-trial defendant's general due-process and fair-trial rights) are separate. Compare, *e.g.*, *Turner* v. *Rogers*, 131 S. Ct. 2507, 2516 (2011) (characterizing right to appointed counsel for indigent defendant in a criminal trial as a Sixth Amendment right), with *Drope* v. *Missouri*, 420 U.S. 162, 172 (1975) (characterizing competency at criminal trial as a

due process right). And in the postconviction setting in particular, a prisoner's competency to consult personally with an attorney has never been an inflexible prerequisite to litigating his habeas claims. To the contrary, courts have long recognized that a "next friend" may sometimes pursue a habeas petition on behalf of a prisoner who "is unable to litigate his own cause due to mental incapacity." *Whitmore* v. *Arkansas*, 495 U.S. 149, 165 (1990).

A prisoner's right to competency in the postconviction context has traditionally been quite limited. The only constitutional right to competency that this Court has recognized for convicted prisoners is an Eighth Amendment prohibition against "carrying out a sentence of death upon a prisoner who is insane." *Panetti* v. *Quarterman*, 551 U.S. 930, 934 (2007) (quoting *Ford* v. *Wainwright*, 477 U.S. 399, 409-410 (1986)). That prohibition, however, does not imply a right of competence to assist counsel in the litigation of a collateral attack on the original conviction and sentence. First of all, a claim of incompetence to be executed generally does not become ripe "until *after* the time has run to file a first federal habeas petition." *Id.* at 943 (emphasis added). Furthermore, a prisoner may be competent to be executed even if he is not competent to communicate with counsel. Justice Powell's controlling opinion in *Ford* v. *Wainwright*, *supra*, explained that the standard for competency to be executed requires only that the prisoner be aware "of the punishment [he is] about to suffer and why [he is] to suffer it," not that he be "able to assist in his own defense." 477 U.S. at 422 & n.3 (Powell, J., concurring in part and concurring in the judgment); see *Panetti*, 551 U.S. at 949 (stating that Justice Powell's concurrence in *Ford* is the controlling opinion).

Had Congress intended for Section 3599 to create not only a new right to counsel, but also a new right of competency, in the postconviction context, it would have said so expressly. Not only the Constitution, but also the laws of a number of States, permit execution of an otherwise competent prisoner even if he is not "able to assist in his own defense." *Ford*, 477 U.S. at 422 n.3 (Powell, J., concurring in part and concurring in the judgment) (noting that the "prevailing test" in the States did not require competence to assist counsel as a prerequisite to carrying out a death sentence). The right recognized by the court of appeals, however, would as a practical matter frequently supersede those constitutional and state-law rules. If a district court is required to stay a capital prisoner's first habeas petition when he cannot assist counsel, the court will also have to stay the prisoner's execution. See *Lonchar* v. *Thomas*, 517 U.S. 314, 320 (1996) ("If the district court cannot dismiss the petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot."). Congress gave no express indication that, by guaranteeing a right to postconviction counsel, it intended to occupy the field in the area of competency as well.

3. Neither respondent nor the court of appeals has provided any specific evidence, textual or otherwise, that Congress implicitly intended to take such a transformative step. The court of appeals, in its seminal case recognizing the statutory right of competence to assist counsel in postconviction proceedings, focused extensively on common-law concepts of competency during and after trial. See *Rohan* v. *Woodford*, 334 F.3d 803, 807-812 (9th Cir.), cert. denied, 540 U.S. 1069 (2003); see also Br. in Opp. 21-23. But whatever the common law on

that issue may have been, it does not illustrate the meaning of a statute that establishes only a right to counsel. As the court of appeals acknowledged, "the right to competence has met with a mixed constitutional reception," as this Court has recognized a defendant's right of competence to assist in his defense at trial but has not required a similar degree of competency before a lawfully convicted prisoner may be executed. *Rohan*, 334 F.3d at 808-809. Nothing in Section 3599 gives a postconviction right of competence a more favorable reception—or even suggests that Congress intended to create a statutory right of competence at all.

The court of appeals also suggested that principles of constitutional avoidance support the inference of a right to competency in Section 3599. *Rohan*, 334 F.3d at 813-814. In its view, a "substantial constitutional question[]" exists whether due process requires a right of competency as a necessary adjunct any time a statute grants a right to counsel. *Id.* at 813. But this Court's decision in *Pennsylvania* v. *Finley*, 481 U.S. 551, 554-559 (1987), casts doubt on such a due process right. The respondent in *Finley* argued that he had been denied due process when postconviction counsel, appointed pursuant to state law, had withdrawn on appeal without following the procedures described in *Anders* v. *California*, 386 U.S. 738 (1967). See 481 U.S. at 557-558. This Court rejected that argument, concluding that "the State has made a valid choice to give prisoners the assistance of [postconviction] counsel without requiring the full panoply of procedural protections that the Constitution requires be given to defendants who are in a fundamentally different position—at trial and on first appeal as of right." *Id.* at 559. The Court explained that in the postconviction context, "the Constitution does not put the

State to the difficult choice between affording no counsel whatsoever or following the strict procedural guidelines annunciated in *Anders*." *Ibid.* Similarly, here, Congress could make a "valid choice" to provide counsel to indigent capital prisoners seeking postconviction relief without providing an additional right to competency to assist that counsel.

Finally, the court of appeals relied on this Court's actions in *Rees* v. *Peyton* as "support[ing]" its interpretation of Section 3599. *Rohan*, 334 F.3d at 815; see 384 U.S. 312 (1966) (per curiam); 386 U.S. 989 (1967); *Rees* v. *Superintendent of the Va. State Penitentiary*, 516 U.S. 802 (1995); see also Br. in Opp. 11-13. In that case, Melvin Rees, a state capital prisoner, filed a habeas corpus petition in federal district court challenging his murder conviction. *Rees*, 384 U.S. at 312-313. The district court denied relief; the court of appeals affirmed; and Rees's counsel, with Rees's consent, filed a petition for a writ of certiorari. *Id.* at 313. Roughly a month later, however, "Rees directed his counsel to withdraw the petition and forgo any further legal proceedings." *Ibid.* Counsel advised the Court that "he could not conscientiously accede to these instructions" because he feared that Rees was incompetent. *Ibid.* This Court, "in aid of the proper exercise of [its] certiorari jurisdiction," ordered the district court to determine whether Rees had "capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." *Id.* at 313-314. Following the Court's instructions, the district court determined that Rees was incompetent. *Rohan*, 334 F.3d at 815 (citing district court docket). This

Court, apparently over the State's objection, then ordered that the case be "held without action on the petition for certiorari until further order." 386 U.S. at 989. The petition remained held until 1995, when the Court dismissed it, apparently because Rees had passed away. 516 U.S. at 802; see *Rohan*, 334 F.3d at 815 n.8.

Rees is not instructive on the meaning of Section 3599. The case substantially predates the 1988 enactment of Section 3599's predecessor, and neither the court of appeals nor respondent has identified any evidence that Congress had *Rees* in mind when it passed the statute. The only connection between *Rees* and federal statutory law is a "Cf." citation by this Court suggesting that the district court, in carrying out the instruction to hold a competency hearing, might follow procedures similar to the federal statutory procedures for determining trial competence. See 384 U.S. at 314 (citing 18 U.S.C. 4244, 4245 (1964)).

In any event, *Rees* does not address the situation presented by this case. *Rees* did not concern competency to *litigate* a federal habeas petition, but instead competency "to *withdraw* a certiorari petition." *Godinez* v. *Moran*, 509 U.S. 389, 398 n.9 (1993) (emphasis added). The Court's disposition of *Rees* therefore should not be taken to suggest that a prisoner has a right to stay his habeas proceedings indefinitely on the ground that he is not able to assist in the litigation. To the contrary, the Court has since suggested that if a habeas applicant meets the incompetency standard set forth in *Rees*, the case might be litigated without his participation by a "next friend." See *Whitmore*, 495 U.S. at 166 (using *Rees* to define the standard for determining when a prisoner's mental incapacity might permit "next friend" habeas litigation).

B. District Courts Have Inherent Authority To Grant Limited Competency-Related Stays In Certain Cases

1. Although Section 3599 does not mandate that a district court stay a capital prisoner's habeas proceedings when he is incompetent to assist counsel, neither does it preclude the possibility of such a stay. Even in the habeas context, "[d]istrict courts do ordinarily have authority to issue stays, where such a stay would be a proper exercise of discretion." *Rhines* v. *Weber*, 544 U.S. 269, 276 (2005) (citations omitted). Section 3599 neither expressly nor implicitly withdraws that authority.

Of course, a district court's discretion to grant a stay in a case like this is "circumscribe[d]" by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. *Rhines*, 544 U.S. at 276. Stays of habeas petitions filed under AEDPA must "be compatible with AEDPA's purposes," one of which "is to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases." *Ibid.* (citation and internal quotation marks omitted). It is difficult to see how an indefinite competency-related stay, or a competency-related stay of a habeas petition that could fairly be litigated without the capital prisoner's assistance, could be squared with that purpose. Cf. *id.* at 277 (declining to endorse stay procedure in which a petition could be "stayed indefinitely"). But AEDPA would not necessarily foreclose, for example, a stay for a limited period, in a case where the capital prisoner's participation appeared crucial, in order to afford the prisoner the opportunity to regain his competence (either naturally or through medication). Cf. *ibid.* (permitting habeas stays to allow for state-court review of unexhausted claims on showing of "good cause"). In

such a circumstance, the district court would presumably have discretion to strike an appropriate balance between the capital prisoner's interest in pursuing his habeas claims and the State's (and AEDPA's) "strong interest in proceeding with its judgment." *Gomez* v. *United States Dist. Court*, 503 U.S. 653, 654 (1992) (per curiam).

2. In this case, the district court declined to stay respondent's habeas proceedings because it concluded that his claims were purely record-based and could be fairly litigated by counsel without respondent's personal involvement. Pet. App. C14, C16, C27-C28. The court of appeals reversed, based on its view that respondent was entitled to a stay if he were incompetent to litigate his judicial-bias claim, which it believed "could potentially benefit" from respondent's involvement despite being limited to the written record. *Id.* at A5-A6.

The court of appeals erred in concluding that respondent had such a right. The court of appeals did not disturb the district court's finding that respondent's habeas claims were fully developed and could be litigated even if respondent were not competent to assist counsel. See Pet. App. C7-C27. Under those circumstances, the court of appeals had no warrant for ordering a stay. Even assuming the district court could, consistent with AEDPA, grant a limited stay, declining to do so would not constitute an abuse of its equitable discretion.

II. REVIEW OF THE COURT OF APPEALS' INTERLOCUTORY DECISION IS UNWARRANTED

Despite the error in its analysis, the court of appeals' interlocutory decision does not warrant this Court's review at this time. First, in the eight years since the Court declined to review the court of appeals' original

decision addressing the question presented, see *Rohan*, 540 U.S. 1069, no circuit conflict has developed, and the issue appears to have arisen infrequently. Second, the Court is already set to issue a decision this Term that is likely to address the scope of Section 3599, and the courts of appeals should have a chance to consider that decision before the Court decides the question presented here. Finally, the question presented here may be mooted by further proceedings in this case.

1. There is no circuit conflict on the question presented. No court of appeals has expressly disagreed with the conclusion that a capital prisoner has a statutory right under 18 U.S.C. 3599 to be competent to assist counsel during postconviction proceedings. Indeed, no court of appeals other than the Ninth Circuit has squarely addressed the issue.

The Eighth and Eleventh Circuits (as well as the Fifth Circuit, in an unpublished opinion) have declined to decide the question because the issue has thus far arisen only in cases where the record has indicated the capital prisoner's competence. See *Ferguson* v. *Secretary for Dep't of Corrections*, 580 F.3d 1183, 1222 & n.55 (11th Cir. 2009), cert. denied, 130 S. Ct. 3360 (2010); *Paul* v. *United States*, 534 F.3d 832, 848 (8th Cir. 2008), cert. denied, 130 S. Ct. 51 (2009); *Clayton* v. *Roper*, 515 F.3d 784, 790 (8th Cir.), cert. denied, 555 U.S. 1003 (2008); *Mines* v. *Dretke*, 118 Fed. Appx. 806, 812-813 (5th Cir. 2004) (unpublished). The Seventh Circuit has simply assumed that Section 3599 creates a competency right (and has stayed postconviction proceedings as a result) in a case where the State of Indiana "declined to challenge" that assumption. *Holmes* v. *Buss*, 506 F.3d 576, 578 (2007); see *Holmes* v. *Levenhagen*, 600 F.3d 756, 763 (7th Cir. 2010). And the Sixth Circuit has held,

in accord with the court of appeals' decision here, that a district court should stay postconviction proceedings when a capital prisoner is incompetent to assist counsel, although it located the right in the federal competency-hearing statute, 18 U.S.C. 4241, rather than in Section 3599. *Carter* v. *Bradshaw*, 644 F.3d 329, 332-333, 336 (2011), petition for cert. pending *sub nom. Tibbals* v. *Carter*, No. 11-218 (filed Aug. 17, 2011);[2] compare *Blair* v. *Martel*, 645 F.3d 1151, 1155 (9th Cir. 2011) (concluding that Section 4241 does not apply to a prisoner seeking federal habeas relief).

Moreover, it is not clear that the question presented has such exceptional importance that certiorari would be warranted in the absence of a circuit conflict. It appears that federal courts have stayed very few habeas cases on competency grounds. States' Amicus Br. 8-10; Reply Br. 3-4. And in no case has a court granted such a stay for a federal capital prisoner. Should such stays become more common, this Court will have future opportunities to address the question presented.

2. Even if the question presented otherwise merited review, the Court should wait to address it. The Court has already granted certiorari in a case for this Term,

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[2] The State's petition for a writ of certiorari in *Carter* contends that the Sixth Circuit erred in construing *Rees* to provide capital prisoners with a right to competency under Section 4241. Pet. at 11-23, *Carter*, *supra*, No. 11-218 (Aug. 17, 2011). For the reasons stated in the text, *infra*, the government believes that review of any petition presenting a question concerning competency stays of capital habeas proceedings would be premature. But if the Court were to decide that the issue warrants further review, this case provides a better vehicle, because it would allow the Court to address not only the *Rees* argument, but the Section 3599 argument as well. See Reply at 4 n.1, *Carter*, *supra*, No. 11-218 (Nov. 11, 2008) (observing that Section 3599 is not at issue in that case).

Martel v. *Clair*, No. 10-1265 (argued Dec. 6, 2011), that may shed light on the scope and meaning of the right to counsel under Section 3599. *Clair*, which (like this case) comes to the Court from the Ninth Circuit, concerns the proper standard for substitution of counsel appointed pursuant to Section 3599. Pet. at i, *Clair*, *supra* (No. 10-1265). The petitioner in *Clair* has cited the Ninth Circuit's decision in this case, as well as the precedents the decision relied on, and contends that the issues in the two cases are related. *Id.* at 17; see Cert. Reply at 3-4, *Clair*, *supra* (No. 10-1265); Pet. Br. at 31 n.16, *Clair*, *supra* (No. 10-1265).

The Court's analysis in *Clair* may affect analysis of the question presented here. The warden petitioner in *Clair* argues, in part, that the standard for substituting counsel under Section 3599 should be narrow because Section 3599 itself is narrow. Pet. Br. at 17-39, *Clair*, *supra* (No. 10-1265). In the warden's view, Section 3599 does not contain a guarantee of effective assistance of counsel similar to the Sixth Amendment's. *Ibid.* In contrast, the respondent (Clair) asserts that the district court erred by failing to conduct an inquiry in response to his motion to substitute counsel, which alleged, among other things, "a 'total breakdown' of communication between attorney and client." Resp. Br. at 35, *Clair*, *supra* (No. 10-1265); *id.* at 6-9, 34-36 (describing counsel's alleged failures to follow up on evidentiary leads and to cooperate with Clair's investigator, despite Clair's instruction); see also Tr. of Oral Argument at 23-24, *Clair*, *supra* (No. 10-1265) (counsel for warden acknowledging that counsel would have to defer to the prisoner on certain "basic" decisions, such as whether to file a habeas petition). The Court's response to those arguments would have significant bearing on the scope of the right

guaranteed by Section 3599, which could in turn inform consideration of the question presented here.

3. It would thus be premature to grant plenary review in this case while *Clair* is still pending. And because this case is in an interlocutory posture, the most expedient course would be to deny certiorari and allow the lower-court proceedings to continue, rather than to cause further delay by holding the case for *Clair*. The district court has not yet addressed the question of respondent's competence. Pet. App. C28. A determination that respondent can, in fact, competently assist counsel would eliminate any need for this Court to review the question presented. And if he is found to be incompetent, the district court and court of appeals could take into account this Court's eventual decision in *Clair* in determining whether a stay is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2012

AMICUS CURIAE BRIEF

Nos. 10-930 and 11-218

In the Supreme Court of the United States

CHARLES L. RYAN, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS,
PETITIONER

v.

ERNEST VALENCIA GONZALES
(CAPITAL CASE)

TERRY TIBBALS, WARDEN, PETITIONER

v.

SEAN CARTER
(CAPITAL CASE)

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE NINTH AND SIXTH CIRCUITS

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 3599(a)(2), which provides that an indigent capital inmate pursuing federal post-conviction relief "shall be entitled to the appointment of one or more attorneys," entitles such a prisoner to a stay of his federal postconviction proceedings if he is not competent to assist his counsel (No. 10-930).

2. Whether this Court's decision in *Rees* v. *Peyton*, 384 U.S. 312 (1966), affords a capital inmate a "right to competence" in federal postconviction proceedings and entitles such a prisoner to a stay of those proceedings if he is not competent to assist his counsel (No. 11-218).

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In the Supreme Court of the United States

No. 10-930

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ON WRITS OF CERTIORARI
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BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

Ryan v. *Gonzales*, No. 10-930, presents the question whether 18 U.S.C. 3599(a)(2), which provides that an indigent capital prisoner pursuing federal postconviction relief "shall be entitled to the appointment of one or more attorneys," entitles such a prisoner to a stay of his federal postconviction proceedings if he is not competent to assist his counsel. *Tibbals* v. *Carter*, No. 11-218, pres-

ents the question whether this Court's decision in *Rees* v. *Peyton*, 384 U.S. 312 (1966), affords a capital inmate a "right to competence" in federal postconviction proceedings and entitles such a prisoner to a stay of those proceedings if he is not competent to assist his counsel. Although these cases arise on federal habeas review of state convictions under 28 U.S.C. 2254, federal capital prisoners challenging the legality of their detention under 28 U.S.C. 2255 (2006 & Supp. II 2008) also have a statutory right to counsel. See 18 U.S.C. 3599(a)(2). Furthermore, if the Court were to conclude that *Rees* affords state capital prisoners a right to competence in federal postconviction proceedings, that holding would presumably extend to federal capital prisoners. The United States therefore has a substantial interest in the Court's resolution of the questions presented. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of *Gonzales*, No. 10-930.

STATEMENT

A. *Ryan* v. *Gonzales*, No. 10-930

1. In 1990, respondent Gonzales stabbed to death Darrel Wagner and severely injured Deborah Wagner while he was burglarizing their home. *State* v. *Gonzales*, 892 P.2d 838, 842 (Ariz. 1995), cert. denied, 516 U.S. 1052 (1996). His first trial for felony murder and other offenses resulted in a hung jury. *Id.* at 842-843; Pet. App. C10. Before retrial, Gonzales, acting pro se, unsuccessfully moved to disqualify the trial judge based on adverse rulings and on-the-record comments from the first trial. Pet. App. C10-C12. After a retrial, Gonzales was convicted on all counts. *Id.* at C12; *Gonzales*, 892 P.2d at 842-843. Before sentencing, Gonzales again unsuccessfully moved to disqualify the trial judge. Pet.

App. C12. The trial court sentenced Gonzales to death for the felony-murder conviction and imposed prison terms for the other counts. *Gonzales*, 892 P.2d at 843.

Gonzales's appellate counsel raised several issues on direct appeal, including the judicial-bias claim. *Gonzales*, 892 P.2d at 843. The Supreme Court of Arizona rejected the judicial-bias argument and affirmed. *Id.* at 843, 847-848, 852. This Court denied certiorari.

After the judgment became final, Gonzales sought state postconviction review. Pet. App. B3. His asserted grounds included a judicial-bias claim. *Id.* at C15. The state courts denied relief. *Id.* at B3.

2. In 1999, Gonzales filed a petition for federal habeas corpus relief pursuant to 28 U.S.C. 2254. Pet. App. B3. The Office of the Federal Public Defender was appointed to represent him pursuant to 18 U.S.C. 3599(a)(2), which provides that in federal postconviction proceedings "seeking to vacate or set aside a death sentence" imposed by either a state or a federal court, "any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services." Counsel's appointment covers not only the district-court proceedings, but also additional proceedings, including "applications for stays of execution and other appropriate motions and procedures," as well as "such competency proceedings and proceedings for executive or other clemency as may be available." 18 U.S.C. 3599(e).

In 2000, Gonzales filed a federal habeas petition raising 60 claims, including a judicial-bias claim. Pet. App. B3, C10. He later withdrew 13 claims so that he could pursue them in state court. *Id.* at C2. His renewed mo-

tion for state postconviction relief included a claim that he was not competent to assist his postconviction counsel. *Id.* at B3. The state court rejected that claim as noncognizable. *Id.* at B3-B4.

3. a. In 2006, after the case had returned to federal court, Gonzales's counsel moved for a competency determination and a stay. Pet. App. A2, B5. Counsel relied on *Rohan* v. *Woodford*, 334 F.3d 803 (9th Cir.), cert. denied, 540 U.S. 1069 (2003), in which the court of appeals had held that "where an incompetent capital habeas petitioner raises claims that could potentially benefit from his ability to communicate rationally, refusing to stay proceedings pending restoration of competence denies him his statutory right to assistance of counsel" provided by 18 U.S.C. 3599(a)(2). *Rohan*, 334 F.3d at 819; Pet. App. B5. Counsel asserted that "due to a progressive deterioration in Gonzales's mental health he had lost the ability to rationally communicate with his counsel and assist them" and that his "assistance was essential to a number of his remaining habeas claims." Pet. App. A3.

The district court permitted two mental-health experts to examine Gonzales, but they reached conflicting conclusions. Pet. App. C3. Gonzales's expert concluded that Gonzales was not competent to understand his current legal situation or to assist counsel and that there was a good chance he would remain incompetent even if medicated. *Id.* at C4. The State's expert concluded that Gonzales was competent and was faking his symptoms, noting that Gonzales had "verbalized his desire to be found incompetent, (and thereby delay or avoid [execution])." *Id.* at C3-C4. The State's expert could not, however, exclude the possibility of a mental disorder, and

she recommended a period of observation, and medication if necessary. *Id.* at C4.

At the end of a 90-day assessment at the Arizona State Hospital, the supervising psychologist concluded that Gonzales had a "genuine psychotic disorder" and was "currently unable to communicate rationally for any extended period of time." Pet. App. C5. The psychologist became convinced that Gonzales's symptoms were genuine after observing improvement when Gonzales was put on antipsychotic medication. *Ibid.* Medication, however, had been discontinued at Gonzales's request, after he complained of side effects including back pain and restlessness. *Id.* at B5-B6, C5.

b. The district court denied Gonzales's request for a stay and a competency determination. Pet. App. C29. The court concluded that incompetence would not entitle Gonzales to a stay of the proceedings. *Id.* at C7-C29. The court explained that Gonzales's "properly-exhausted claims are record-based and/or resolvable as a matter of law, irrespective of [his] capacity for rational communication with counsel." *Id.* at C27-C28; see *id.* at C7-C27. With respect to the judicial-bias claim in particular, the court observed that the record "is fully developed"; that "additional, relevant facts do not exist that are within [Gonzales's] private knowledge"; and that, in any event, Gonzales's failure to allege or prove such facts in state court precluded further factual development in federal court. *Id.* at C16 (citing, *inter alia*, 28 U.S.C. 2254(e)(2)).

Because the court concluded that none of the exhausted claims could benefit from Gonzales's assistance, it did not reach the issue of whether Gonzales was, in fact, sufficiently competent or whether he could be medicated to competence. See Pet. App. C6, C28-29. The

court noted, however, that the record indicated Gonzales possessed a limited capacity for rational communication, which likely could be maximized through the use of antipsychotic medication. *Id.* at C28 & n.14.

4. Gonzales asked the court of appeals for an emergency stay of the district-court proceedings and an emergency writ of mandamus. Pet. App. E1-E2. The court granted a temporary stay and ordered briefing. *Ibid.*; see *id.* at F1-F2; *id.* at G1-G2. It then stayed the appellate proceedings pending resolution of *Nash* v. *Ryan*, 581 F.3d 1048 (9th Cir. 2009), cert. dismissed, 130 S. Ct. 1757 (2010). Pet. App. H2. The court later held in *Nash* that "the statutory right to competence in capital habeas cases that we recognized in *Rohan* applies to appeals," such that a prisoner "who lacks the ability to communicate rationally, and who seeks to raise claims on appeal that could potentially benefit from such communication is entitled to a stay of the appeal until [he] is found competent." 581 F.3d at 1055.

In October 2010, the court of appeals granted a writ of mandamus, holding that Gonzales "is entitled to a stay pending a competency determination." Pet. App. A2, A9. The court reasoned that *Nash* foreclosed the district court's conclusion "that a stay under *Rohan* is categorically unavailable when a capital habeas petitioner's claims consist only of record-based or legal questions." *Id.* at A5. The proper "claim-specific inquiry," the panel stated, "'should be whether rational communication with the [prisoner] is essential to counsel's ability to meaningfully prosecute'" the claim. *Ibid.* (quoting *Nash*, 581 F.3d at 1054).

The court concluded that Gonzales's judicial-bias claim satisfied the test. The court noted that Gonzales "had eleven different attorneys over the course of his

trial and sentencing, and was self-represented for part of that time." Pet. App. A5. The court stated that Gonzales's judicial-bias claim "centers on events regarding which 'counsel may need to communicate with [Gonzales] to understand fully the significance and context' of key facts so that counsel can pursue the most persuasive arguments." *Ibid.* (quoting *Nash*, 581 F.3d at 1053) (internal alterations omitted).

B. *Tibbals* v. *Carter*, No. 11-218

1. In 1997, respondent Carter raped his adoptive grandmother and stabbed her to death. *State* v. *Carter*, 734 N.E. 2d 345, 347-349 (Ohio 2000) (*Carter I*). Following his indictment on aggravated murder and other charges, three experts examined Carter to determine whether he was competent to stand trial. *Id.* at 355. One expert concluded that Carter was unable to assist in his own defense; the other two found him competent. *Id.* at 355-356. After the trial court held two hearings and found Carter competent, a jury convicted him of aggravated murder and other charges. *Id.* at 350, 355-356. The court sentenced Carter to death for the aggravated murder conviction and prison terms for the other counts. *Id.* at 350. Carter's appellate counsel raised several issues on direct appeal, including a challenge to the trial court's competency finding. *Id.* at 355-356. The Ohio Supreme Court rejected Carter's competency argument and affirmed. *Id.* at 356, 360. The court also conducted an independent review of Carter's sentence, including the mitigation evidence presented at trial, and concluded that the death penalty was appropriate. *Id.* at 359-360.

Carter sought postconviction relief in state court. He asserted that his attorneys had "failed to develop a complete record to show that he was incompetent to stand

trial because his paranoid personality did not permit him to trust, or therefore consult with and aid, his lawyers." *State* v. *Carter*, No. 99-T-0133, 2000 Ohio App. LEXIS 5935, at *10 (Ohio Ct. App. Dec. 15, 2000) (*Carter II*). He further asserted that "trial counsel did not properly prepare for the penalty phase of the trial." *Id.* at *8.

The trial court denied relief and the state appellate court affirmed. The appellate court stated that Carter's "inability or unwillingness to aid his attorneys in the defense of his case is well-documented in the record" and that nothing in Carter's petition or brief "raise[d] new grounds or point[ed] to anything outside the record to demonstrate that he is entitled to relief or a hearing." *Carter II*, 2000 Ohio App. LEXIS 5935, at *13. The court further stated that Carter's claim of ineffective assistance during the penalty phase was "not supported by the record" and that Carter "did not submit any evidentiary documents or point to any evidence outside of the record that would indicate that he was entitled to relief or a hearing on th[at] claim." *Id.* at *10.

2. In 2002, Carter's lawyers filed a federal habeas corpus petition pursuant to 28 U.S.C. 2254. Pet. App. 3a, 28a. They later filed a motion seeking a competency determination and a stay of the proceedings. *Id.* at 27a.

The district court held a competency hearing, during which Carter called two experts. Pet. App. 29a-33a. Dr. Robert Stinson testified that Carter suffered from schizophrenia, as well as depressive disorder and a personality disorder. *Id.* at 30a. He testified that the schizophrenia distorted Carter's inferential thinking, affected his communication, and prevented him from developing "a factual understanding of the proceedings" or from "truly understand[ing] the adversarial nature of

the proceedings." *Id.* at 30a-32a. Dr. Stinson further testified that Carter believed he could not be executed unless he volunteered. *Id.* at 31a-32a. Dr. Stinson's prognosis for Carter's return to lucidity was "poor," based on his observation that, even with powerful antipsychotic medication, Carter still experienced several symptoms of schizophrenia. *Id.* at 31a. Dr. Michael Gelbort testified that Carter's "thinking skills are fragmented and distracted" and that, while Carter could provide "basic assistance, * * * it's not worth a whole lot of time or effort on his attorneys' part because his cognitive capabilities are so limited." *Id.* at 32a-33a.

The State's expert, Dr. Phillip Resnick, agreed that Carter had schizophrenia, but concluded that he understood the nature of the murder conviction and the punishment and met "the minimum standard [of ability to assist defense counsel] because he [could] speak rationally and convey information," although he could not elaborate on his responses. Pet. App. 34a-35a.

The district court applied the Ninth Circuit's decision in *Rohan*, *supra*, to Carter's claims. Pet. App. 42a-48a. The court identified several exhausted claims that "potentially could benefit from Carter's assistance," including claims of ineffective assistance of trial and appellate counsel (for failure to adequately develop and pursue the competency claim) and ineffective assistance of counsel during the penalty phase. *Id.* at 42a-43a. The court next considered whether petitioner was competent to assist his counsel with litigation of those claims and concluded he was not. *Id.* at 44a. The court found that although Carter's capacity to understand his position and the proceedings was "debatable," his inability to assist counsel in developing his claims was "clear-cut." *Id.* at 44a-47a. The court disposed of the case by dis-

missing Carter's habeas petition without prejudice and prospectively tolling the one-year limitations period for filing a federal habeas petition, see 28 U.S.C. 2244(d), "until such time as [Carter] is competent to proceed with [the] litigation." Pet. App. 53a.

3. a. The court of appeals amended the district court's judgment. Pet. App. 1a-15a. The court concluded that the district court had not abused its discretion by holding a competency hearing and finding Carter incompetent. *Id.* at 8a-9a. The court acknowledged that capital prisoners "do not enjoy a constitutional right to competence" in federal postconviction proceedings. *Id.* at 4a. The court read this Court's decision in *Rees* v. *Peyton*, 384 U.S. 312 (1966), however, to afford capital prisoners a statutory right to competence during federal postconviction proceedings, grounded in the federal competency-hearing statute, 18 U.S.C. 4241. Pet. App. 4a-9a. The court stated that this Court had "appl[ied] section 4241 to habeas actions" in *Rees* and had thereby "define[d] a statutory right for the petitioner to be competent enough to (1) understand the nature and consequences of the proceedings against him, and (2) assist properly in his defense." *Id.* at 6a.

The court concluded, however, that the district court had improperly disposed of the case. The court explained that rather than dismissing Carter's habeas petition and tolling the statute of limitations prospectively, the district court should have instead "stayed [the proceedings] according to section 4241(d)" for any claims that the district court determined "essentially require [Carter's] assistance," until such time as Carter is found competent. Pet. App. 13a-15a. The court explained that staying the proceedings "would allow all parties to remain actively involved and the court to monitor Carter's

on-going condition." *Id.* at 14a. The court noted that if the district court on remand concluded that Carter's assistance was not "essential" to the "full and fair adjudication" of any of Carter's claims, it should appoint a "next friend" to litigate them. *Id.* at 15a. The court agreed, however, that Carter's assistance was essential to litigation of his ineffective-assistance-of-counsel claims because "Carter alone has evidence of the interactions between him and his trial and appellate attorneys, and that evidence is inaccessible as long as [Carter] remains unable to communicate with his habeas attorneys." *Id.* at 12a.

b. Judge Rogers dissented. Pet. App. 15a-26a. In his view, Carter's asserted right to competence in habeas proceedings "has no basis in the Constitution or federal statutes." *Id.* at 15a-16a. He explained that the federal competency-hearing statute, 18 U.S.C. 4241, "provides for competency hearings for defendants in criminal proceedings, and cannot be read to extend to post-conviction proceedings." Pet. App. 19a. He further explained that *Rees* stands for the proposition that a habeas petitioner must be competent to terminate his postconviction proceedings, but not to assist counsel in those proceedings. *Id.* at 18a. In that respect, he reasoned, the prisoner is a witness in support of his petition, and civil proceedings are not halted when a witness becomes incompetent. *Id.* at 24a-26a. Judge Rogers stated that the majority's decision "allows habeas petitioners to prevent States from enforcing their judgments, potentially forever, on the grounds of a nonexistent right to competency in habeas proceedings." *Id.* at 15a-16a.

SUMMARY OF ARGUMENT

A. This Court has never recognized a constitutional right to counsel during collateral review of a conviction or sentence, but Congress has created a statutory right to counsel for capital prisoners in federal postconviction proceedings. See 18 U.S.C. 3599 (2006 & Supp. II 2008). Section 3599 does not expressly create a right to be competent to assist counsel. The court of appeals' holding in *Gonzales*, No. 10-930, that Section 3599 implicitly guarantees an additional right to competence to assist counsel—and a right for capital prisoners who are unable to meet that standard to stay their postconviction proceedings—does not withstand scrutiny.

In the postconviction setting, a prisoner's competence has never been an inflexible prerequisite to litigating his habeas claims. Courts have long recognized that a "next friend" may sometimes pursue a habeas petition on behalf of a prisoner who is unable to litigate his own case due to mental incapacity. See *Whitmore* v. *Arkansas*, 495 U.S. 149 (1990). The only constitutional right to competency that this Court has recognized for convicted prisoners is an Eighth Amendment prohibition against carrying out a death sentence against an insane person. See *Ford* v. *Wainwright*, 477 U.S. 399 (1986) (plurality opinion). By requiring a stay of postconviction proceedings when a capital prisoner is unable to assist his counsel, the right recognized by the court of appeals in *Gonzales* would frequently supersede the constitutional rule recognized in *Ford*, which requires a stay only when the prisoner is unaware of the punishment he is about to suffer and why he is to suffer it, not when he is unable to assist his lawyers.

The court of appeals' holding in *Gonzales* is not justified by common-law concepts of competency during and

after trial. The right to competency in postconviction proceedings is not provided by the Constitution, and it is not expressly provided by Section 3599. Moreover, no valid due-process concerns justify inferring a right to competency in Section 3599. Although due process demands that a criminal defendant be competent to stand trial, the demands of due process are less stringent after the conclusion of direct review. Congress could, consistent with constitutional principles, choose to provide counsel to indigent capital prisoners seeking postconviction relief without providing those prisoners with an additional right of competence to assist counsel in those proceedings.

B. Neither the federal competency-hearing statute, 18 U.S.C. 4241, nor this Court's decision in *Rees* v. *Peyton*, 384 U.S. 312 (1966), affords a right to competence to assist postconviction counsel as the court of appeals concluded in *Carter*, No. 11-218. By its terms, Section 4241 does not apply to postconviction proceedings. It permits a district court to grant a competency hearing between the commencement of a prosecution and the sentencing, or between the commencement of supervised release and the completion of a sentence. 18 U.S.C. 4241(a). Postconviction proceedings do not occur during those specified periods.

This Court's citation of the competency-hearing statute in *Rees* did not create a right to competency in federal postconviction proceedings. In *Rees*, the Court instructed the district court to determine whether Rees, who had tried to withdraw his petition for certiorari, had the capacity to make a rational choice about whether to abandon his petition. It included a "Cf." citation to the then-current version of the federal competency-hearing statute. 384 U.S. at 314. After the district court found

Rees incompetent, the Court held his petition without further action until he died. *Rees* does not address whether an inmate has a right to be competent to *litigate* his federal habeas petition; it stands only for the proposition that he must be competent to *withdraw* his petition and forgo postconviction relief.

Nor does *Rees* suggest that Section 3599 provides a right to competence in postconviction proceedings. *Rees* substantially predates the 1988 enactment of Section 3599's predecessor, and there is no evidence that Congress considered *Rees* when it enacted Section 3599.

C. Although Section 3599 and *Rees* do not mandate that a district court stay a capital prisoner's postconviction proceedings when he is incompetent to assist counsel, district courts have inherent authority to granted limited competency-related stays in appropriate circumstances. In the postconviction context, the district court would have discretion to grant a stay that was consistent with the purposes of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, which are to reduce delays in the execution of state and federal sentences and to further the principles of comity, finality, and federalism.

When a capital prisoner's claims can be fairly litigated without his assistance, a competency-related stay would be difficult to justify. That will usually be the case in Section 2254 proceedings, where a federal court's review of claims that were exhausted before a state court is limited to the state-court record. See 28 U.S.C. 2254(d)(1); *Cullen* v. *Pinholster*, 131 S. Ct. 1388, 1398 (2011). In cases where a capital prisoner's assistance would be crucial to a potentially meritorious claim, AEDPA would not necessarily foreclose a stay for a lim-

ited period to afford the prisoner the opportunity to regain his competence.

D. Indefinite stays of postconviction proceedings were not warranted in either of these cases. In *Gonzales*, the district court concluded that the claims were record-based and could fairly be litigated without Gonzales's assistance. Under those circumstances, the court of appeals had no warrant for ordering a stay.

In *Carter*, the ineffective-assistance-of-counsel claims that the court of appeals identified as warranting a stay are record-based and would not require Carter's assistance. Under those circumstances, no stay, let alone an indefinite one, was appropriate to determine whether Carter might regain competence.

ARGUMENT

A CAPITAL PRISONER'S INCOMPETENCE TO ASSIST HIS COUNSEL DOES NOT PROVIDE GROUNDS FOR AN INDEFINITE STAY OF POSTCONVICTION PROCEEDINGS

A. Section 3599 Does Not Guarantee A Right Of Competence To Assist Postconviction Counsel

1. The Sixth Amendment, as applied to the States through the Fourteenth Amendment, provides that the accused "[i]n all criminal prosecutions * * * shall * * * have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. At trial, that constitutional guarantee entitles indigent felony defendants to appointed counsel in either state or federal court. See *Gideon* v. *Wainwright*, 372 U.S. 335, 341, 344 (1963); *Johnson* v. *Zerbst*, 304 U.S. 458, 463 (1938). Once the right to counsel attaches, it applies at all phases of the trial proceedings "where substantial rights of a criminal accused may be affected." *Mempa* v. *Rhay*, 389 U.S. 128, 134 (1967); see *United States* v. *Wade*, 388 U.S. 218,

224-225 (1967). The Court has further held, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, that indigent defendants pursuing their first appeal of right from a criminal conviction have a right to appointed counsel. *Douglas* v. *California*, 372 U.S. 353, 356-357 (1963); see *Halbert* v. *Michigan*, 545 U.S. 605, 610 (2005).

The Court has never recognized a constitutional right to counsel during collateral review of a conviction or sentence. See, *e.g.*, *Martinez* v. *Ryan*, 132 S. Ct. 1309, 1315 (2012); *Lawrence* v. *Florida*, 549 U.S. 327, 336-337 (2007); *Coleman* v. *Thompson*, 501 U.S. 722, 752 (1991). Congress, however, "created a statutory right to qualified legal representation for capital defendants in federal habeas corpus proceedings" when it enacted 18 U.S.C. 3599. *McFarland* v. *Scott*, 512 U.S. 849, 851 (1994); see also *Martel* v. *Clair*, 132 S. Ct. 1276, 1283-1285 (2012).[1] Section 3599(a)(2) provides that "[i]n any post conviction proceeding under" 28 U.S.C. 2254 or 2255 "seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the

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[1] Section 3599 was originally enacted as part of the statute creating the federal capital offense of drug-related homicide, and it was originally codified at 21 U.S.C. 848(q)(4)-(10) (1988). Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001(b), 102 Stat. 4393-4394. In 2006, Congress determined that the Federal Death Penalty Act of 1994, 18 U.S.C. 3591 *et seq.*, would provide the exclusive framework for imposing a federal death sentence. It repealed the death-penalty procedures in Title 21 and moved the statute providing for appointment of counsel, without substantive change, to 18 U.S.C. 3599. See Terrorist Death Penalty Enhancement Act of 2005, Pub. L. No. 109-177, § 222, 120 Stat. 231-232.

furnishing of such other services in accordance with subsections (b) through (f)." Counsel appointed under the statute must generally meet certain experience requirements, 18 U.S.C. 3599(b)-(d), and will, unless replaced, represent the litigant throughout a variety of judicial and other proceedings, 18 U.S.C. 3599(e). Section 3599 "reflec[ts] a determination that quality legal representation is necessary in all capital proceedings to foster fundamental fairness in the imposition of the death penalty." *Clair*, 132 S. Ct. at 1285 (internal quotation marks and citation omitted).

Section 3599 does not, however, expressly create a right to be competent to assist counsel in federal capital postconviction proceedings. The only mention of "competency" in Section 3599 appears in the list of proceedings in which appointed counsel will represent the habeas applicant, which includes "such competency proceedings * * * as may be available." 18 U.S.C. 3599(e). But Section 3599 does not itself make "available" any new categories of "competency proceedings." And the federal statute governing competency determinations, 18 U.S.C. 4241, does not apply to capital postconviction proceedings. See p. 23, *infra*.

2. a. The court of appeals in *Gonzales*, No. 10-930, concluded that Section 3599 implicitly guarantees an additional right of competence to assist counsel and, in turn, a right for capital prisoners unable to meet that competency standard to stay their federal postconviction proceedings. That holding does not withstand scrutiny.

Even at trial, the right to counsel (which is guaranteed by the Sixth Amendment) and the right to competency (which is guaranteed as part of a criminal-trial defendant's general due-process and fair-trial rights) are separate. Compare, *e.g.*, *Turner* v. *Rogers*, 131 S.

Ct. 2507, 2516 (2011) (characterizing right to appointed counsel for indigent defendant in a criminal trial as a Sixth Amendment right), with *Drope* v. *Missouri*, 420 U.S. 162, 172 (1975) (characterizing competency at criminal trial as a due-process right). In the postconviction setting in particular, a prisoner's competency to consult personally with an attorney has never been an inflexible prerequisite to litigating his habeas claims. To the contrary, courts have long recognized that a "next friend" may sometimes pursue a habeas petition on behalf of a prisoner who "is unable to litigate his own cause due to mental incapacity." *Whitmore* v. *Arkansas*, 495 U.S. 149, 165 (1990); see 28 U.S.C. 2242 ("Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.").[2]

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[2] Rule 2(c)(5) of the Rules Governing Section 2254 Cases in the United States District Courts was specifically amended to permit a motion for postconviction relief to be signed "by the petitioner or by a person authorized to sign it for the petitioner under 28 U.S.C. [Section] 2242." See also Rules Governing Section 2255 Proceedings for the United States District Courts R. 2(b)(5). The advisory committee amending those rules referred to *Whitmore* and clarified that it expected courts to "apply third-party, or 'next-friend,' standing analysis in deciding whether the signer was actually authorized to sign the petition on behalf of the petitioner." Rules Governing Section 2254 Cases R. 2 advisory committee's note (2004); accord Rules Governing Section 2255 Proceedings R. 2 advisory committee's note (2004).

Furthermore, Federal Rule of Civil Procedure 17(c), which applies to federal postconviction proceedings, see Rules Governing Section 2254 Cases R. 12 (Supp. III 2009); Rules Governing Section 2255 Proceedings R. 12, broadly provides for the appointment of a "next friend" to pursue federal claims on behalf on an incompetent person. See Fed. R. Civ. P. 17(c) ("A minor or an incompetent person who does not have a duly adopted representative may sue by a next friend or by a guardian ad litem.").

The only constitutional right to competency that this Court has recognized for convicted prisoners is an Eighth Amendment prohibition against "carrying out a sentence of death upon a prisoner who is insane." *Panetti* v. *Quarterman*, 551 U.S. 930, 934 (2007) (quoting *Ford* v. *Wainwright*, 477 U.S. 399, 409-410 (1986) (plurality opinion)). The prohibition against executing an insane prisoner, however, does not imply a right of competence to assist counsel in the litigation of a collateral attack on the original conviction and sentence. First of all, a claim of incompetence to be executed generally does not become ripe "until *after* the time has run to file a first federal habeas petition." *Id.* at 943 (emphasis added). Furthermore, a prisoner may be competent to be executed even if he is not competent to communicate with counsel. Justice Powell's controlling opinion in *Ford* explained that the standard for competency to be executed requires only that the prisoner be aware "of the punishment [he is] about to suffer and why [he is] to suffer it," not that he be "able to assist in his own defense." 477 U.S. at 422 & n.3 (Powell, J., concurring in part and concurring in the judgment); see *Panetti*, 551 U.S. at 949 (stating that Justice Powell's concurrence in *Ford* is the contr[illegible]ling opinion).

Had Congress intended for Section 3599 to create not only a new right to counsel, but also a new right of competency in the postconviction context, it would have said so expressly. Not only the Constitution, but also the laws of a number of States, permit execution of an otherwise competent prisoner even if he is not "able to assist in his own defense." *Ford*, 477 U.S. at 422 n.3 (Powell, J., concurring in part and concurring in the judgment) (noting that the "prevailing test" in the States did not require competence to assist counsel as a prerequisite to

carrying out a death sentence). The right recognized by the court of appeals in *Gonzales*, however, would as a practical matter frequently supersede those constitutional and state-law rules. If a district court is required to stay a capital prisoner's first habeas petition when he cannot assist counsel, the court will also have to stay the prisoner's execution. See *Lonchar* v. *Thomas*, 517 U.S. 314, 320 (1996) ("If the district court cannot dismiss the petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot."). Congress gave no express indication that, by guaranteeing a right to postconviction counsel, it intended to occupy the field in the area of competency as well.

b. The court of appeals in *Gonzales* provided no specific evidence, textual or otherwise, that Congress implicitly intended to take such a transformative step by enacting Section 3599. In the previous Ninth Circuit case on which the court of appeals' decision was based, the court focused extensively on common-law concepts of competency during and after trial. See *Rohan* v. *Woodford*, 334 F.3d 803, 807-812, cert. denied, 540 U.S. 1069 (2003); see also *Gonzales* Br. in Opp. 21-23. But whatever the common law on that issue may have been, it does not illuminate the meaning of a statute that establishes only a right to counsel. As the court in *Rohan* acknowledged, "the right to competence has met with a mixed constitutional reception," as this Court has recognized a defendant's right of competence to assist in his defense at trial but has not required a similar degree of competency before a lawfully convicted prisoner may be executed. 334 F.3d at 808-809. Nothing in Section 3599 gives a postconviction right of competence a more favor-

able reception—or even suggests that Congress intended to create a statutory right of competence at all.

c. The court in *Rohan* also suggested that principles of constitutional avoidance support the inference of a right to competency in Section 3599. 334 F.3d at 813-814. In its view, a "substantial constitutional question[]" exists whether due process requires a right of competency as a necessary adjunct any time a statute grants a right to counsel. *Id.* at 813. No valid due-process concerns, however, would justify inferring a right to competency in Section 3599.

A criminal trial is "the paramount event for determining the guilt or innocence of the defendant." *Herrera* v. *Collins*, 506 U.S. 390, 416 (1993). Due process demands that a criminal defendant be competent to stand trial, see *Drope*, *supra*, because a defendant who cannot understand the nature of the proceedings against him or assist counsel in preparing his defense will be unable to exercise other rights "deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so." See *Cooper* v. *Oklahoma*, 517 U.S. 348, 354 (1996) (internal quotation marks and citation omitted).

Once the direct appeal concludes, however, "a presumption of finality and legality attaches to the conviction and sentence." *Barefoot* v. *Estelle*, 463 U.S. 880, 887 (1983). At that point, the demands of due process become less stringent. For example, in *Pennsylvania* v. *Finley*, 481 U.S. 551 (1987), a prisoner argued that he had been denied due process when postconviction counsel, appointed pursuant to state law, had withdrawn on appeal without following the procedures described in

Anders v. *California*, 386 U.S. 738 (1967). See *Finley*, 481 U.S. at 557-558. This Court rejected that argument, concluding that "the State has made a valid choice to give prisoners the assistance of [postconviction] counsel without requiring the full panoply of procedural protections that the Constitution requires be given to defendants who are in a fundamentally different position—at trial and on first appeal as of right." *Id.* at 559. In the postconviction context, "the Constitution does not put the State to the difficult choice between affording no counsel whatsoever or following the strict procedural guidelines annunciated in *Anders*." *Ibid.*

The government "has more flexibility in deciding what procedures are needed in the context of postconviction relief." *District Attorney's Office for Third Judicial Dist.* v. *Osborne*, 557 U.S. 52, 69 (2009). Due process requires only that the habeas petitioner have "an adequate opportunity to present his claims fairly." *United States* v. *MacCollom*, 426 U.S. 317, 327-328 (1976); see also *Finley*, 481 U.S. at 556 (holding that postconviction proceedings are constitutional if they "comport[] with fundamental fairness"). Consistent with those principles, Congress could make a "valid choice" to provide counsel to indigent capital prisoners seeking postconviction relief without providing an additional right to competency to assist that counsel.

B. *Rees* v. *Peyton* Does Not Afford A Right Of Competence To Assist Postconviction Counsel

Unlike the Ninth Circuit in *Gonzales*, the Sixth Circuit in *Carter*, No. 11-218, did not rely on Section 3599 to require a competency-based stay of federal postconviction proceedings. Instead, the court concluded that this Court had already recognized a statutory "right to com-

petence" in federal postconviction proceedings grounded in the federal competency-hearing statute, 18 U.S.C. 4241. See Pet. App. 4a (citing *Rees* v. *Peyton*, 384 U.S. 312 (1966)). That is incorrect. Section 4241 does not apply to federal postconviction proceedings, and *Rees* did not hold otherwise.

1. By its terms, the federal competency-hearing statute does not apply to postconviction proceedings. The statute is entitled "Determination of mental competency to stand trial [or] to undergo postrelease proceedings." 18 U.S.C. 4241. It permits a district court to grant a competency hearing, either *sua sponte* or at the request of either party, "[a]t any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence." 18 U.S.C. 4241(a). Capital postconviction proceedings occur neither "prior to the sentencing of the defendant" nor "after the commencement of probation or supervised release."

Furthermore, the statute provides that a hearing should be conducted if there is reasonable cause to believe that "the defendant" is suffering from a mental disease or defect that renders him "unable to understand the nature and consequences of the proceedings against him" or "to assist properly in his defense." 18 U.S.C. 4241(a). In postconviction proceedings, the prisoner is not "the defendant" in "proceedings [brought] against him." Rather, the prisoner initiates postconviction proceedings and requires the government to defend its conviction, which is presumed to be valid. See *Barefoot*, 463 U.S. at 887.

2. The court of appeals in *Carter* did not even attempt to address the plainly inapplicable text of Section 4241. It relied instead on this Court's decision in *Rees*, *supra*, stating that the Court in *Rees* had "appl[ied] section 4241 to habeas actions" and had thereby "define[d] a statutory right for the petitioner to be competent enough to (1) understand the nature and consequences of the proceedings against him, and (2) assist properly in his defense." Pet. App. 6a. The court's reliance on *Rees* is misconceived.

In that case, Melvin Rees, a state capital prisoner, filed a habeas petition in federal district court challenging his murder conviction. *Rees*, 384 U.S. at 312-313. The district court denied relief; the court of appeals affirmed; and Rees's counsel, with Rees's consent, filed a petition for a writ of certiorari. *Id.* at 313. Roughly a month later, however, "Rees directed his counsel to withdraw the petition and forgo any further legal proceedings." *Ibid.* Counsel advised the Court that "he could not conscientiously accede to these instructions" because he feared that Rees was incompetent. *Ibid.* This Court, "in aid of the proper exercise of [its] certiorari jurisdiction," ordered the district court to determine whether Rees had the "capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." *Id.* at 313-314. The Court included a "Cf." citation to 18 U.S.C. 4244-4245 (1964), the predecessor to Section 4241. See *Rees*, 384 U.S. at 314.

Following the Court's instructions, the district court determined that Rees was incompetent. *Rohan*, 334 F.3d at 815 (citing district court docket). This Court,

apparently over the State's objection, then ordered that the case be "held without action on the petition for certiorari until further order." *Rees* v. *Peyton*, 386 U.S. 989 (1967). The petition remained held until 1995, when the Court dismissed it, apparently because Rees had passed away. *Rees* v. *Superintendent of Va. State Penitentiary*, 516 U.S. 802; see *Rohan*, 334 F.3d at 815 n.8.

The Court's "Cf." citation cannot fairly be read to have "appl[ied] section 4241 to habeas actions" as the court of appeals concluded it did. Pet. App. 6a. That citation is more logically read as this Court suggesting that the district court, in carrying out the instruction to hold a competency hearing, might follow procedures similar to the federal statutory procedures for determining trial competence.

In any event, *Rees* does not address the situation presented by these cases. *Rees* did not concern competency to *litigate* a federal habeas petition, but instead competency "to *withdraw* a certiorari petition." *Godinez* v. *Moran*, 509 U.S. 389, 398 n.9 (1993) (emphasis added). The Court's disposition of *Rees* therefore should not be taken to suggest that a prisoner has a right to stay his habeas proceedings indefinitely on the ground that he is not able to assist in the litigation. To the contrary, the Court has since suggested that if a habeas applicant meets the incompetency standard set forth in *Rees*, the case might be litigated without his participation by a "next friend." See *Whitmore*, 495 U.S. at 166 (using *Rees* to define the standard for determining when a prisoner's mental incapacity might permit "next friend" habeas litigation).

3. Nor does *Rees* support the Ninth Circuit's interpretation of Section 3599 as providing a right to competence to assist counsel in postconviction proceedings.

See *Rohan*, 334 F.3d at 815 (stating that *Rees* "supports [the] conclusion" that Section 3599 provides a right to competence in postconviction proceedings). *Rees* substantially predates the 1988 enactment of Section 3599's predecessor, and the Ninth Circuit in *Rohan* identified no evidence that Congress had *Rees* in mind when it passed Section 3599.

C. District Courts Have Inherent Authority To Grant Limited Competency-Related Stays In Certain Cases

1. Although neither Section 3599 nor *Rees* mandates that a district court stay a capital prisoner's habeas proceedings when he is incompetent to assist counsel, those authorities do not preclude the possibility of such a stay. Even in the habeas context, "[d]istrict courts do ordinarily have authority to issue stays, where such a stay would be a proper exercise of discretion." *Rhines* v. *Weber*, 544 U.S. 269, 276 (2005) (citations omitted).

Of course, a district court's discretion to grant a stay is "circumscribe[d]" by AEDPA. *Rhines*, 544 U.S. at 276. Stays of habeas petitions filed under AEDPA must "be compatible with AEDPA's purposes," which are "to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases," *ibid.* (citation and internal quotation marks omitted), and "to further the principles of comity, finality, and federalism," *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003) (citation omitted); see also *Rhines*, 544 U.S. at 277 ("Even where stay and abeyance is appropriate, the district court's discretion in structuring the stay is limited by the timeliness concerns reflected in AEDPA."). This Court repeatedly has emphasized "the State's interest in the finality of convictions that have survived direct review within the state court system," which "'preserve[s] the

federal balance'" by respecting the States' "'good-faith attempts to honor constitutional rights'" as well as their "'sovereign power to punish offenders.'" *Calderon* v. *Thompson*, 523 U.S. 538, 555-556 (1998) (quoting *Murray* v. *Carrier*, 477 U.S. 478, 487 (1986)).

A competency-related stay of a habeas petition that could fairly be litigated without the capital prisoner's assistance could not be squared with those purposes. Nor could an indefinite stay issued solely in the hope that the prisoner might some day regain competence. Cf. *Rhines*, 544 U.S. at 277 (declining to endorse stay procedure in which a case could be "stayed indefinitely"). Such stays would delay—perhaps permanently—resolution of the proceedings and destroy the notion of finality implicit in state court judgments. Those concerns have particular force in capital postconviction proceedings, where the incentive for habeas petitioners to pursue speedy postconviction relief is largely absent. See *id.* at 277-278 (noting that "not all petitioners have an incentive to obtain federal relief as quickly as possible" and that capital prisoners in particular have an interest in "prolong[ing] their incarceration and avoid[ing] execution of the sentence of death"). Such stays would also defeat the purpose of postconviction relief. A prisoner may legitimately commence postconviction proceedings because he has one or more claims that he believes may entitle him to relief from his conviction or sentence. Staying the proceedings of an incompetent prisoner with a meritorious claim, rather than allowing the proceedings to be litigated by a "next friend" with the prisoner's best interests in mind, does nothing to "assure that the habeas petitioner is not being held in violation of his or her federal constitutional rights." *Herrera*, 506 U.S. at 402.

2. a. When a capital prisoner's claims can be fairly litigated without his assistance, a competency-related stay would not be warranted. The prisoner's assistance is not needed to select and advance the arguments having the greatest possibility of success. This Court has "recognized the superior ability of trained counsel in the examination into the record, research of the law, and marshalling of arguments on [the appellant's] behalf." *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983) (citation and internal quotation marks omitted; brackets in original) (holding that on direct appeal, appointed counsel may select the points to be raised and need not raise "nonfrivolous points requested by the client"); see also *Gonzalez* v. *United States*, 553 U.S. 242, 249-250 (2008) ("In most instances the attorney will have a better understanding of the procedural choices than the client; or at least the law should so assume.").

In Section 2254 proceedings, a state capital prisoner's assistance to counsel will usually be unnecessary for resolution of his claims. A state prisoner must generally exhaust the remedies available for his claims in state court. 28 U.S.C. 2254(b)(1)(A). And to be entitled to federal habeas relief on a claim that was adjudicated on the merits in state court, a prisoner must establish that the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. 2254(d)(1). In *Cullen* v. *Pinholster*, 131 S. Ct. 1388 (2011), this Court made clear that the district court's review of such a claim "is limited to the record that was before the state court that adjudicated the claim on the merits." *Id.* at 1398; see *id.* at 1400 ("[E]vidence introduced in federal court has no bearing on [Section] 2254(d)(1) review."). A state prisoner's ability to

provide testimony or direct his counsel to other non-record evidence in support of his exhausted habeas claims is therefore largely irrelevant.

b. In some scenarios, a capital prisoner's testimony or assistance might be crucial to a potentially meritorious habeas claim. For example, a state prisoner may be entitled to a federal evidentiary hearing if he meets the stringent requirements of 28 U.S.C. 2254(e)(2) for a claim that was not adjudicated on the merits in state court. See *Pinholster*, 131 S. Ct. at 1400-1401.[3] Moreover, for a federal capital prisoner, Section 2255 proceedings may be the first opportunity to present evidence of certain collateral claims, for example, ineffective assistance of counsel. See *Massaro* v. *United States*, 538 U.S. 500 (2003). In such circumstances, AEDPA would not necessarily foreclose a stay for a limited period to afford the prisoner the opportunity to regain his competence (on his own or with medication). Cf. *Rhines*, 544 U.S. at 277 (permitting habeas stays to al-

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[3] 28 U.S.C. 2254(e)(2) provides:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

low for state court review of unexhausted claims on showing of "good cause," but noting that a stay would amount to an abuse of discretion if the unexhausted claims "are plainly meritless"); *Nelson* v. *Campbell*, 541 U.S. 637, 649 (2004) ("Before granting a stay, a district court must consider * * * the likelihood of success on the merits."). The district court would have discretion to strike an appropriate balance between the capital prisoner's interest in pursuing his habeas claims and the State's (and AEDPA's) "strong interest in proceeding with its judgment." *Gomez* v. *United States Dist. Court*, 503 U.S. 653, 654 (1992) (per curiam).

Although a limited stay may be appropriate in those circumstances, an indefinite stay would not be. Counsel will usually have means other than the prisoner's knowledge to establish facts outside the record that bear on a potentially meritorious claim. Other witnesses, including the trial and appellate lawyers, could be called to testify, and those witnesses may also have notes and documentary evidence related to the claim. In that respect, the prisoner's testimony is no different than that of a third-party witness, and the unavailability of a third-party witness to testify in support of a habeas petitioner's claims plainly would not warrant an indefinite stay of the postconviction proceedings. Moreover, a district court in capital postconviction proceedings would have the discretion to permit an incompetent prisoner unable to offer testimony on his own behalf to introduce the necessary facts by otherwise inadmissible hearsay. See Fed. R. Evid. 807; cf. *Sears* v. *Upton*, 130 S. Ct. 3259, 3263 n.6 (2010) (per curiam) ("[W]e have * * * recognized that reliable hearsay evidence that is relevant to a capital defendant's mitigation defense should not be excluded by rote application of a state hearsay

rule.") (citing *Green* v. *Georgia*, 442 U.S. 95, 97 (1979) (per curiam)). If it appears that the prisoner will not regain competence during a limited stay, the proper course is for the district court to allow the prisoner's claims to be litigated by a "next friend," not to prevent the State from carrying out its judgment by staying the postconviction proceedings indefinitely.

D. Indefinite Stays Were Not Warranted In Respondents' Cases

1. Under the principles set forth above, the Ninth Circuit's decision in *Gonzales*, No. 10-930, must be reversed. The district court declined to stay Gonzales's habeas proceedings because it concluded that his claims were purely record-based and could be fairly litigated by counsel without his personal involvement. Pet. App. C14, C16, C27-28. The court of appeals reversed, based on its view that Gonzales was entitled to a stay if he were incompetent to litigate his judicial-bias claim, which it believed "could potentially benefit" from Gonzales's involvement despite being limited to the written record. *Id.* at A5-A6; see 28 U.S.C. 2254(d)(1).

The court of appeals erred in concluding that Gonzales had such a right. The court of appeals did not disturb the district court's finding that Gonzales's habeas claims were fully developed and could be litigated even if he were not competent to assist counsel. See Pet. App. C7-C27. Under those circumstances, the court of appeals had no warrant for ordering a stay. Even assuming the district court could, consistent with AEDPA, grant a limited stay, declining to do so would not constitute an abuse of its equitable discretion.

2. The Sixth Circuit's decision in *Carter*, No. 11-218, also must be reversed. The court of appeals correctly

concluded that the district court should have appointed a "next friend" to litigate any claims for which Carter's assistance was not essential for a full and fair adjudication. Pet. App. 15a. The court incorrectly concluded, however, that Carter's ineffective-assistance-of-counsel claims must be stayed until Carter regains competence.

The state court considered and rejected Carter's ineffective-assistance-of-counsel claims in state post-conviction proceedings, *Carter II*, 2000 Ohio App. LEXIS 5935, at *10-*13, and the district court's consideration of those claims would therefore be limited to the state court record, see *Pinholster*, 131 S. Ct. at 1398. Furthermore, even if an evidentiary hearing on those claims were somehow warranted, it is not the case that "Carter alone has evidence of the interactions between him and his trial and appellate attorneys." Pet. App. 12a. Carter's attorneys could provide testimony or other assistance pertaining to their interactions with him, and the state court specifically concluded that Carter's competency claim was well-developed in the record, that he had identified nothing outside the record to indicate that counsel had inadequately pursued the competency claim, and that his claim of ineffective-assistance-of counsel during the penalty phase was unsupported. *Carter II*, 2000 Ohio App. LEXIS 5935, at *10-*13. Under those circumstances, no stay, let alone an indefinite one, was appropriate to determine whether Carter might regain competence.

CONCLUSION

The judgments of the courts of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 3599 (2006 & Supp. II 2008):

Counsel for financially unable defendants

(a)(1) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either—

(A) before judgment; or

(B) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

(2) In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

(b) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had

not less than three years experience in the actual trial of felony prosecutions in that court.

(c) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(d) With respect to subsections (b) and (c), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(e) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

(f) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize

the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

(g)(1) Compensation shall be paid to attorneys appointed under this subsection[1] at a rate of not more than $125 per hour for in-court and out-of-court time. The Judicial Conference is authorized to raise the maximum for hourly payment specified in the[2] paragraph up to the aggregate of the overall average percentages of the adjustments in the rates of pay for the General Schedule made pursuant to section 5305[3] of title 5 on or after such date. After the rates are raised under the preceding sentence, such hourly range may be raised at intervals of not less than one year, up to the aggregate of the overall average percentages of such adjustments made since the last raise under this paragraph.

(2) Fees and expenses paid for investigative, expert, and other reasonably necessary services authorized under subsection (f) shall not exceed $7,500 in any case, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge, if the services were rendered in connection with the case disposed of entirely before such magistrate judge, as neces-

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[1] So in original. Probably should be "section".

[2] So in original. Probably should be "this".

[3] So in original. Probably should be "5303".

sary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active or senior circuit judge.

(3) The amounts paid under this paragraph[4] for services in any case shall be disclosed to the public, after the disposition of the petition.

2. 18 U.S.C. 4241:

Determination of mental competency to stand trial to undergo postrelease proceedings[3]

(a) MOTION TO DETERMINE COMPETENCY OF DEFENDANT.—At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

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[4] So in original. Probably should be "subsection".

[3] So in original. Probably should be "stand trial or to undergo postrelease proceedings".

(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility—

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward; and

(2) for an additional reasonable period of time until—

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the proceedings to go forward; or

(B) the pending charges against him are disposed of according to law;

whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the proceedings to go forward, the defendant is subject to the provisions of sections 4246 and 4248.

(e) DISCHARGE.—When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. The court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial or other proceedings. Upon discharge, the defendant is subject to the provisions of chapters 207 and 227.

(f) ADMISSIBILITY OF FINDING OF COMPETENCY.—A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in

raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.

AMICUS CURIAE BRIEF

Nos. 10-930 and 11-218 [CAPITAL CASES]

In the Supreme Court of the United States

CHARLES L. RYAN, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

ERNEST VALENCIA GONZALES,
Respondent.

TERRY TIBBALS, WARDEN,
Petitioner,

v.

SEAN CARTER,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Sixth Circuits

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

Gonzales v. Ryan (No. 10-930):

> Whether 18 U.S.C. § 3599(a)(2), which provides that an indigent capital inmate pursuing federal post-conviction relief "shall be entitled to the appointment of one or more attorneys," entitles such a prisoner to a stay of his federal post-conviction proceedings if he is not competent to assist his counsel.

Tibbals v. Carter (No. 11-218):

1. Do capital prisoners possess a "right to competence" in federal habeas proceedings under *Rees* v. *Peyton,* 384 U.S. 312 (1966)?

2. Can a federal district court order an indefinite stay of a federal habeas proceeding under *Rees*?

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http://www.americanbar.org/criminaljustice/policy/standards.html. (last visited July 26, 2012) . . . 3

http://www.americanbar.org/groups/individual_rights/projects/death_penalty_moratorium_implementation_project.html (last visited July 26, 2012) 4

http://www.americanbar.org/groups/leadership/house_of_delegates.html (last visited July 26, 2012) 2

http://www.americanbar.org/groups/professional_responsibility.html (last visited July 26, 2012) . 3

http://www.americanbar.org/advocacy/other_aba_inititives/death_penalty_representation.html (last visited July 26, 2012) 4

Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 Cath. U. L. Rev. 1169 (2005) . 16

INTEREST OF *AMICUS CURIAE*

The American Bar Association ("ABA"), as *amicus curiae*, respectfully submits this brief in support of the Respondents.[1] The ABA requests that the Court hold that the statutory right to an attorney under 18 U.S.C. § 3599 includes an effective attorney-client relationship, which requires that a federal defendant or habeas petitioner be sufficiently competent to assist counsel in prosecuting his claims and, if he is not, that he be entitled to an appropriate stay.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its nearly 400,000 members practice in all 50 States, the District of Columbia, and the U.S. Territories, and include attorneys in private firms, corporations, non-profit organizations, and government agencies. They also include judges, prosecutors, defense attorneys and public defenders, as well as legislators, law professors, law students, and non-lawyer "associates" in related fields.[2]

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

[2] Neither this brief nor the decision to file it should be interpreted as reflecting the views of any judicial member of the ABA. No member of the ABA Judicial Division Council participated in this brief's preparation or in the adoption or endorsement of the positions in it.

For over a century, the ABA has been committed to advocating for the ethical and effective representation of all clients, including criminal defendants. In 1908, the ABA adopted the Canons of Professional Ethics as a model for the regulation of attorneys by their state and jurisdictional highest courts. Amended over time, the Canons are now published as the ABA Model Rules of Professional Conduct ("Model Rules").[3] The Model Rules have been adopted in all but a handful of jurisdictions. Arizona, pertinent to Mr. Gonzales' case, adopted the 1983 Model Rules with some amendments in February 1985, and the 2002 amendments in 2003. Ohio, pertinent to Mr. Carter's case, used a version of the 1969 ABA Model Code of Professional Responsibility until adopting its version of the Model Rules in August 2006 (effective Feb. 2007).

In 1908, the ABA established the entity now known as the ABA Standing Committee on Ethics and Professional Responsibility, which publishes formal ethics opinions on professional and judicial conduct, provides informal responses to ethics inquiries, and upon request assists professional organizations and

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[3] The Model Rules, like the Canons and the intervening Model Code of Professional Responsibility, are developed by task forces composed of members of the ABA and national, state, and local bar organizations; they are then reviewed by academicians, practicing lawyers, and the judiciary. They become ABA policy only after vote of the ABA House of Delegates ("HOD"), which is composed of more than 550 representatives from States and Territories, state and local bar associations, affiliated organizations, ABA sections, divisions and members, and the Attorney General of the United States, among others. Information on the HOD is available at http://www.americanbar.org/groups/leadership/house_ of_delegates.html (last visited July 26, 2012).

courts in their development, modification, and interpretation of the Model Rules and other ethical standards.[4] Pertinent to the issues now before the Court is *ABA Formal Ethics Opinion 96-404, Client Under a Disability*, *reprinted in* ABA/BNA Lawyers' Manual on Professional Conduct 109, 110 (ABA 2006) (hereinafter, "Ethics Op."), which is discussed in the Argument, below.

In 1920, the ABA Criminal Justice Section was formed to advocate for improvements in the criminal justice system and in 1964, it began work on the ABA Standards for Criminal Justice ("ABA Standards"). The first edition was published in 1973. Amended over time, the ABA Standards are a collection of "best practices" based on the consensus views of a broad array of criminal justice professionals.[5]

In 1989, the ABA Death Penalty Representation Project presented its Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, which were adopted as ABA policy. These Guidelines were subsequently revised and adopted by the ABA in 2003 and have now been widely adopted by state and local bar associations and indigent defense organizations, and by court rule in many death penalty

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[4] For the Model Rules of Professional Conduct and information on this Standing Committee, *see* http://www.americanbar.org/groups/professional_responsibility.html (last visited July 26, 2012).

[5] For the Standards for Criminal Justice and information on the Criminal Justice Section, *see* http://www.americanbar.org/criminal justice/policy/standards.html (last visited July 26, 2012).

jurisdictions.[6] For more than 25 years, this ABA Project has also provided training and resources to defense counsel and judges, and has recruited hundreds of ABA members to represent *pro bono* death-sentenced prisoners who lack legal counsel. In addition, in 2001, the ABA Death Penalty Moratorium Implementation Project was formed to work with jurisdictions in undertaking comprehensive examinations of their capital punishment laws and processes.[7]

Finally, in 2003, following this Court's ruling in *Atkins* v. *Virginia*, 536 U.S. 304 (2002), the ABA Task Force on Mental Disability and the Death Penalty was formed by the ABA Section of Individual Rights and Responsibilities to consider the extent to which impaired mental conditions other than mental retardation should be exempted from the death penalty.[8] Its conclusions as to prisoners who are

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[6] For the Guidelines and information on the Death Penalty Representation Project, *see* http://www.americanbar.org/advocacy/other_aba_inititives/death_penalty_representation.html (last visited July 26, 2012).

[7] For information on the Death Penalty Moratorium Implementation Project, *see* http://www.americanbar.org/groups/individual_rights/projects/death_penalty_moratorium_implementation_project.html (last visited July 26, 2012). Since 2003, the Moratorium Implementation Project has completed studies of eight death penalty jurisdictions and is studying six additional jurisdictions.

[8] ABA, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, Mental and Physical Disability L. Rep., Sept.-Oct. 2006, at 668 (hereinafter, "*Report on the Death Penalty and Persons with Mental Disabilities*"). The Task Force

unable to assist counsel in post-conviction proceedings were adopted as ABA policy in 2006[9] and are discussed in the Argument below.

Throughout the ABA's century-long commitment to the development of model codes, standards, and guidelines, the ABA's focus has been ensuring that all clients, including capital habeas petitioners, receive quality legal representation. Having concluded that meaningful communication between a client and his lawyer is essential to an effective attorney-client relationship, the ABA respectfully urges this Court to hold that the statutory right to an attorney under 18 U.S.C. § 3599 must include knowing, rational communication and decision-making by the prisoner and an appropriate stay when the prisoner is not competent to participate.

SUMMARY OF ARGUMENT

For the right to appointment of counsel under § 3599 to be meaningful, the appointment must result in an attorney-client relationship that includes both the right to knowing, rational communication and decision-making by the capital habeas petitioners and,

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was composed of 24 lawyers and mental health professionals, both practitioners and academics, and included members of the American Psychiatric Association and the American Psychological Association. Its conclusions were submitted to the ABA House of Delegates as Recommendation with Report #122A and adopted as ABA policy in August 2006. With minor changes, the Recommendation with Report was officially endorsed by the other two groups. *Id.* at 668-69.

[9] *Id.*

in appropriate circumstances, the right to an appropriate stay of proceedings when they are not competent to participate. Further, the lawyers appointed under § 3599 must retain their ability to comply with their licensing jurisdictions' formulations of the Model Rules. The Model Rules require that the lawyers maintain, as far as reasonably possible, normal lawyer-client relationships, and that they initiate appropriate protective actions, which may include moving for a stay of proceedings when they reasonably believe their clients cannot adequately act in the clients' own interests.

Under the Model Rules, effective communication between the client and lawyer is presumed. When the normal relationship is impaired, the lawyer should continue as far as reasonably possible to take actions consistent with the client's directions and decisions. Because the attorney-client relationship is one of agent and principal, however, a lawyer has no choice but to withdraw if the client's impairment is such that the lawyer is unable to comply with his or her responsibilities under the Model Rules. However, if withdrawal cannot be accomplished without material adverse effect on the client, the Model Rules provide for the lawyer to continue the representation and seek appropriate protective action on behalf of the client.

While the Model Rules permit a lawyer to seek and federal habeas law provides for appointment of a guardian in appropriate circumstances, appointment of a guardian is a serious deprivation of the client's rights and should not be undertaken by the lawyer if other, less drastic, solutions are available. Consistent with the Model Rules, accordingly, the ABA asserts that a lawyer appointed under § 3599 must be able to

pursue "other protective action," including moving for a stay of proceedings in appropriate circumstances.

Clearly, an attorney's showing that a capital habeas petitioner's incompetence will prevent a fair and accurate resolution of specific claims should be sufficient grounds for a stay. However, the showing required should be flexible, and based on the wide variety of difficulties that arise from a prisoner's impairments and the circumstances of the case. Accordingly, the ABA requests that this Court hold that § 3599 also requires that courts use a flexible standard based on the particular incompetency of a petitioner and the circumstances of the case in determining whether a stay is appropriate.

ARGUMENT

I. FOR SECTION 3599'S RIGHT TO AN ATTORNEY TO BE MEANINGFUL, THE ATTORNEY-CLIENT RELATIONSHIP MUST INCLUDE BOTH KNOWING, RATIONAL COMMUNICATION AND DECISION-MAKING BY THE CAPITAL HABEAS PETITIONERS AND AN APPROPRIATE STAY WHEN THEY ARE NOT COMPETENT TO PARTICIPATE.

This Court, in its unanimous opinion last term in *Martel* v. *Clair*, stated that when Congress passed the legislation now known as 18 U.S.C. § 3599, which governs the appointment of counsel in capital cases, it did so in light of "'the seriousness of the possible penalty and . . . the unique and complex nature of the

litigation.'" 132 S. Ct. 1276, 1284-85 (2012) (quoting 18 U.S.C. § 3599(d) (2006)).[10]

The ABA respectfully asserts that for the right to appointment of counsel to be meaningful, the appointment must result in an attorney-client relationship in which there is a right to knowing, rational communication and decision-making by the capital habeas petitioners and, in appropriate circumstances, a right to a stay of proceedings when they are not competent to participate. Further, the lawyers appointed under § 3599 must retain their ability to comply with their licensing jurisdictions' formulations of the Model Rules. This requires that the lawyers maintain, as far as reasonably possible, normal lawyer-client relationships, and when the lawyers reasonably believe that their clients cannot adequately act in the clients' own interests, that they initiate protective actions that, in appropriate circumstances, may include a request for a stay of proceedings.

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[10] The ABA notes that, in *Tibbals* v. *Carter,* Respondent Mr. Carter's brief addresses § 3599 in the alternative. While the ABA, in this brief, addresses only § 3599 as it applies to the duties of lawyers under the Model Rules, the ABA agrees with Respondent Carter that the courts have inherent equitable power to impose stays as a matter of discretion.

A. Effective Legal Representation Requires That Lawyers Comply With The Licensing States' Formulations Of Model Rule 1.14 When Representing Clients Who Are Not Competent

As the Court stated in *Martel*, § 3599 "seeks to promote effective representation for persons threatened with capital punishment" and "aims in multiple ways to improve the quality of representation afforded to capital petitioners and defendants alike." 132 S. Ct. at 1285. It sets requirements, *inter alia*, for counsel's level of legal experience and rates of compensation, "in part to attract better counsel." *Id.* These measures "'reflec[t] a determination that quality legal representation is necessary' in all capital proceedings to foster 'fundamental fairness in the imposition of the death penalty.'" *Id.* (quoting *McFarland* v. *Scott*, 512 U.S. 849, 855, 859 (1994)).[11] In order for there to be "effective" and "quality" representation when a client is not competent, lawyers must comply—at a minimum—with their licensing jurisdictions' formulations of Model Rule 1.14(a) and (b).[12]

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[11] *See also McFarland*, 512 U.S. at 859 ("By providing indigent capital defendants with a mandatory right to qualified legal counsel in these proceedings, Congress has recognized that federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty.").

[12] Arizona Rule of Professional Conduct 1.14, pertinent to Mr. Gonzales petition, and Ohio Rule of Professional Conduct 1.14, pertinent to Mr. Carter's petition, mirror Model Rule1.14.

Model Rule 1.14(a) provides:

> (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

A "normal client-lawyer relationship presumes that there can be effective communication between the client and lawyer." Ethics Op. at 110 (citing Model Rule 1.4(a)).[13] The relationship also presumes "that the

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[13] Model Rule 1.4(a) states that a lawyer shall:

> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
>
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
>
> (3) keep the client reasonably informed about the status of the matter;
>
> (4) promptly comply with reasonable requests for information; and
>
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

Model Rule 1.4(a) is consistent with the common law tradition,

client, after consultation with the lawyer, can make considered decisions about the objectives of the representation and the means of achieving those objectives." Ethics Op. at 110 (citing Model Rule 1.2(a)).[14]

When a normal attorney-client relationship is impaired, the lawyer should "continue to treat the client with attention and respect, attempt to communicate and discuss relevant matters, and continue as far as reasonably possible to take action consistent with the client's directions and decisions." *Id.* (citing Comment 1 to Model Rule 1.14(a)). However, in these circumstances, Model Rule 1.14(b) provides:

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which some federal appellate courts have relied on in concluding that there is a right to competence in habeas proceedings under § 3599. *E.g.*, *Rohan ex rel. Gates* v. *Woodford*, 334 F.3d 803, 807-08 (9th Cir.) (discussing competence in phases of proceedings; concluding that, at common law, competence was tied to "capacity for rational communication"), *cert. denied*, 540 U.S. 1069 (2003); *Holmes* v. *Buss*, 506 F.3d 576, 578 (7th Cir. 2007) (citing *Rohan*); *cf. Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981) (noting that attorney-client privilege "recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client") (citation omitted).

[14] Model Rule 1.2(a) states: "[A] lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued." *See also, ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. Feb. 2003), *reprinted in* 31 Hofstra L. Rev. 913, 1009 (2003) ("Overcoming barriers to communication and establishing a rapport with the client are critical to effective representation.").

> When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

In the absence of Model Rule 14(b), where the client's impairment is such that the lawyer is unable to comply with her responsibilities to the client under the Model Rules, the lawyer would have no choice but to withdraw. Ethics Op. at 112 (citing Model Rule 1.16(a)(1)) (withdrawal required where "representation will result in violation of the rules of professional conduct"). In fact, "[b]ecause the relationship of client and lawyer is one of principal and agent, principles of agency law might operate to suspend or terminate the lawyer's authority to act when a client is incompetent." *Id.* at 110.

In considering whether to proceed under Model Rule 14(b) or Model Rule 1.16(a)(1), the lawyer must carefully consider the ramifications to the client:

> The particular circumstances may also be such that the lawyer cannot withdraw without prejudice to the client. For instance, the client's incompetence may develop in the middle of a pending matter and substitute counsel may not be able to represent the client effectively due to

> the inability to discuss the matter with the client.

Ethics Op. at 112; *see also* Model Rule 1.16(b) (stating that a lawyer may withdraw if "(1) withdrawal can be accomplished without material adverse effect on the interests of the client").

Without concluding that a lawyer can never withdraw based on the incompetency of a client, the authors of the Ethics Opinion believed that "the better course of action, and the one most likely to be consistent with Rule 1.16(b), will often be for the lawyer to stay with the representation and seek appropriate protective action on behalf of the client." Ethics Op. at 112 (citing Model Rule 14(b)). That is, the Model Rules permit a narrow exception to the normal responsibilities of a lawyer to the client by "permitting the lawyer to take action [under Model Rule 14(b)] that by its very nature must be regarded as 'adverse' to the client." *Id.* at 113-14.

Further, although Model Rule 14(b) permits a lawyer to seek the appointment of a guardian in appropriate circumstances, and while the federal habeas statute anticipates that a petition may be filed by someone acting on the petitioner's behalf in some circumstances, *see* 28 U.S.C. § 2242, "[t]he appointment of a guardian is a serious deprivation of the client's rights and ought not be undertaken if other, less drastic, solutions are available." Ethics Op. at 112. Before taking this step, the lawyer must make "the requisite determination on his own that a guardianship is necessary and is the least restrictive alternative." *Id.* at 114. Similarly,

> Although not expressly dictated by the Model Rules, the principle of respecting the client's autonomy dictates that the action taken by a lawyer who believes the client can no longer adequately act in his or her own interest should be the action that is reasonably viewed as the least restrictive action under the circumstances.

Id. at 112.

Accordingly, the ABA asserts that when a lawyer appointed under § 3599 determines that an incompetent capital habeas client cannot adequately act in his or her own interest, the lawyer must be able to pursue "the least restrictive action under the circumstances," and this must include moving for a stay of proceedings in appropriate circumstances. *See id.*

The ABA therefore requests that this Court conclude that appointment of counsel under § 3599 requires an attorney-client relationship that includes the right both to knowing, rational communication and decision-making by the capital habeas petitioner and, in appropriate circumstances, a stay of proceedings when the habeas petitioner is not competent to participate.

B. Courts Should Use A Flexible Standard In Determining Whether A Stay Is Appropriate Under The Circumstances.

As the ABA Task Force on Mental Disability and the Death Penalty stated in its *Report on Death Penalty and Persons with Mental Disabilities*:

> Many issues raised in collateral proceedings can be adjudicated without the prisoner's participation, and these matters should be litigated according to customary practice. However, collateral proceedings should be suspended if the prisoner's counsel makes a substantial and particularized showing that the prisoner's impairments would prevent a fair and accurate resolution of specific claims . . . .

Id. at 674 (citing, *inter alia*, *Council* v. *Catoe*, 359 S.C. 120, 597 S.E.2d 782, 787 (2004)); *Catoe*, 597 S.E.2d at 787 ("[T]he default rule is that [post-conviction review] hearings must proceed even though a petitioner is incompetent. For issues requiring the petitioner's competence to assist his [post-conviction] counsel, such as a fact-based challenge to his defense counsel's conduct at trial, the [post-conviction] judge may grant a continuance, staying review of these issues until petitioner regains his competence.").

Clearly, a showing that a client's incompetence will prevent a fair and accurate resolution of specific claims should be sufficient grounds for a stay, and where the lawyer makes such a showing, the court should stay the proceedings. *See Carter* v. *Florida*, 706 So. 2d 873, 875 (Fla. 1997) ("There can be no question that a capital defendant's competency is crucial to a proper

determination of a collateral claim when the defendant has information necessary to the development or resolution of that claim.").

However, the showing required should be flexible, depending on the prisoner's impairments and the circumstances of the case. For example, a stay may also be appropriate where incompetency prevents the determination of whether the client has viable claims. *See, e.g.*, *People* v. *Owens*, 564 N.E.2d 1184, 1187 (Ill. 1990) ("[Illinois Supreme Court Rule 651] is not satisfied where appointed counsel cannot determine whether a post-conviction petitioner has any viable claims, because the petitioner's mental disease or defect renders him incapable of communicating in a rational manner. In either circumstance, the appointment of an attorney is but an empty formality.") (internal citations omitted); Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 Cath. U. L. Rev. 1169, 1180 (2005) ("[A] prisoner's impairments could obscure potentially valid claims, preventing counsel from finding out about them at all, or could inhibit his effective participation in an evidentiary hearing involving specific claims that are known to counsel.").

Further, a stay may be appropriate even when all of the facts relevant to the case appear to be widely known. In claims of ineffective assistance of counsel, for example, what was presented at trial will be set out in the record. However, a competent defendant may enhance his counsel's understanding of the importance of information known by counsel and provide information that was not presented, thereby enhancing his counsel's ability to demonstrate an unappreciated

importance of presented as well as missing information to the court. *See, e.g.*, *Holmes* v. *Buss*, 506 F.3d at 580 (noting that in pursuing post-conviction relief a client "may—if mentally competent—be able to convey to his lawyers a better sense of the alleged misbehavior of the prosecutor and of defense counsel than the trial transcript and other documentation provide").

Also, as to "strategic" choices—even those commonly perceived to be within the expertise of appellate counsel—it may be necessary for a client to be able to communicate with counsel when, under the Model Rules, they are choices for the client to make. As stated by the Seventh Circuit:

> When the issue is competence to *appeal*, the tactical question whether to plead incompetence and if one prevails perhaps remain on death row for the rest of one's life, or to press for a new trial even at the risk of another conviction and another death sentence, becomes all-important, and it is a question on which input from the petitioner is vital. It's not really a lawyer's decision at all, though the lawyer can advise on the likelihood that habeas corpus relief will be granted and, if so, that the petitioner will again be sentenced to death and perhaps have then no basis for seeking relief.

Holmes v. *Levenhagen*, 600 F.3d 756, 758-59 (7th Cir. 2010).

Finally, a stay may be appropriate where the lawyer informs the court that, contrary to his obligations to the client under the Model Rules, the

lawyer cannot conscientiously accede to his client's instructions because of evidence casting doubt on the client's mental competency. *See, e.g.*, *Rees* v. *Peyton*, 384 U.S. 312, 313-14 (1966) (directing trial court to determine "whether [Rees] has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises").

As the *Report on Death Penalty and Persons with Mental Disabilities* explained:

> Thorough post-conviction review of the legality of death sentences has become an integral component of modern death penalty law, analogous in some respects to direct review. Any impediment to thorough collateral review undermines the integrity of the review process and therefore the death sentence itself.

Id. at 674. As illustrated in each of the circumstances above, a prisoner's competence to communicate rationally with counsel may be such an impediment. They also illustrate the variety and complexity of some of the difficulties that lawyers confront when attempting to establish that a stay is appropriate under the circumstances of their clients' incompetence and the facts of their cases.

Accordingly, the ABA requests that this Court hold that appointment of counsel under § 3599 requires both knowing, rational communication and decision-making by capital habeas petitioners and an appropriate stay of the proceedings when they are not

competent to participate, and that it also requires that the courts use a flexible standard, based on the particular incompetency of a petitioner and the circumstances of the case, in determining whether a stay is appropriate.

CONCLUSION

For the foregoing reasons, *amicus curiae* the American Bar Association respectfully requests that the decisions of the Courts of Appeals for the Sixth and Ninth Circuits be affirmed.

Respectfully submitted,

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JULY 27, 2012

AMICUS CURIAE BRIEF

Nos. 10-930 & 11-218

IN THE

Supreme Court of the United States

CHARLES L. RYAN, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS,
Petitioner,

—v.—

ERNEST VALENCIA GONZALES,
Respondent.

TERRY TIBBALS, WARDEN,
Petitioner,

—v.—

SEAN CARTER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS
FOR THE NINTH AND SIXTH CIRCUITS

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS, IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Ohio and the ACLU of Arizona are two of its statewide affiliates. Founded more than 90 years ago, the ACLU has participated in numerous cases before this Court involving the scope and meaning of federal habeas corpus, both as direct counsel and as *amicus curiae*. Through its Capital Punishment Project, the ACLU also represents individuals charged with capital offenses, as well as those who have already been convicted and sentenced to death.

The National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the Constitution. NAFD is a nationwide, non-profit, volunteer organization. Its membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. As *amicus curiae*, the organization offers a unique perspective on federal criminal law questions because its members represent a majority of those individuals charged with federal crimes in every district, throughout all

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no one other than *amici curiae*, its members or its counsel made a contribution to fund the preparation or submission of this brief.

the circuits. Pertinent to Carter's and Gonzales's cases, NAFD members represent capital clients at trial, on appeal, and in federal habeas litigation. The questions before the Court are therefore familiar, and of substantial importance, to the NAFD and its members.

STATEMENT OF THE CASE

These cases involve two death row prisoners who have been found incompetent to participate in the litigation of their federal habeas petitions by virtue of their progressive mental illnesses.

Ernest Gonzales is an Arizona death-row inmate, found by a state psychologist to "suffer[] from a 'genuine psychotic disorder' and [to be] . . . 'unable to communicate rationally for any extended period of time, such as would be required by a legal proceeding.'" Pet. App. A3, C4-C6. Gonzales repeatedly refused visits from counsel (about whom he was irrationally suspicious), displayed delusions in letters to the courts, and appeared not to understand the legal proceedings. *See* Pet. App. A3, C2; Em. Motion for Writ of Mandamus 24; Supp. Br. in Support of Pet. for Mandamus 29, 33 and attachments. During state post-conviction proceedings, a state court found him incompetent and thus unable to represent himself (but ruled that state law did not require him to be competent for post-conviction proceedings to proceed). *See* Supp. Reply Br. in Support of Pet. for Writ of Mandamus 6; Dist. Ct. Doc. No. 102 (Mot. For Competency Determination and to Stay Proceedings and Attachments); Resp. Br. in Opp. 1; Pet. App. B3. The federal district court acknowledged expert reports for

both the State and Gonzales finding Gonzales incompetent to proceed, but ultimately held it was unnecessary to determine competency. *See* Pet. App. A3, C4-5, C24, C28. The Court of Appeals for the Ninth Circuit held that the record supported a finding that Gonzales was incompetent and that a stay of proceedings should issue. Pet. App. A1-A9.

Sean Carter is an Ohio death-row prisoner found by experts for both the State and Carter to suffer from debilitating schizophrenia. Pet. App. at 30-35a. Questions surrounding Carter's mental competence go back at least to the time of his 1998 trial, where this disputed issue divided the appointed psychiatric experts but was ultimately resolved by the trial judge against Carter. *State v. Carter*, 734 N.E.2d 345, 355-56 (Ohio 2000). Though the experts disagreed as to how well Carter could assist in his case, they both agreed that Carter could not "fully and articulately communicate with his counsel." *Id.* The federal district court credited these experts, and found Carter incompetent to proceed. Pet.App. 36a-42a, 47a. The Court of Appeals for the Sixth Circuit found that the district court determination was within its discretion based on the evidence, and directed the court to stay all claims requiring Carter's assistance. *Id.* at 8a-9a, 14a-15a.

SUMMARY OF ARGUMENT

1. For death-row prisoners, a federal habeas corpus petition under 28 U.S.C. § 2254 can be a life and death matter.[2] As this Court has acknowledged, "Congress has recognized that federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty." *McFarland v. Scott*, 512 U.S. 849, 859 (1994).

Both Carter and Gonzales persuasively show that the lower courts properly stayed their federal habeas proceedings because, in both cases, mental illness makes them temporarily incompetent to participate. *Amici* endorse their legal arguments, but do not repeat them here. This amicus brief instead will answer, through case examples, two questions: First, in what ways might a competent death row prisoner meaningfully participate in the litigation of his petition? And second, by contrast, how might mentally incompetent prisoners be harmed by their inability to participate?

2. Contrary to the States' arguments, Pet. Tibbals Br. 25-26; Pet. Ryan Br. 14-15, a capital habeas petitioner's role is not limited to a passive wait on death row for the outcome of a "purely legal" proceeding handled exclusively by lawyers working remotely. The attorney-client relationship is a two-way street. See Br. for American Bar Association as *Amicus Curiae* (describing law and professional rules

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[2] For economy, the habeas provisions contained in sections 2254 and 2244 of Chapter 28 of the United States Code are hereafter cited merely with their section number, such as §2254 or §2244.

undergirding attorney-client partnership). And if the lawyer is required by experience and role to be more active, it does not follow that the petitioner is or becomes entirely passive in the prosecution of what is "likely his single opportunity for federal habeas review of the lawfulness of his imprisonment and of his death sentence." *Holland v. Florida*, __ U.S. __, 130 S. Ct. 2549, 2564 (2010). As shown below, full access to that opportunity hinges on the prisoner's ability to be involved at various junctures that include: prompting counsel to timely file his habeas petition; prompting his lawyers to raise all viable federal claims; moving to substitute counsel when counsel fails to protect his rights; participating in the development of the facts where an evidentiary hearing has been ordered or sought; and participating in litigation of a variety of facts concerning the state-court proceedings that may well be significant, if not outcome determinative, in the litigation of the federal writ.

3. Although many condemned prisoners suffer from physical or mental illnesses or emotional problems that affect their ability to interact with counsel, few are ever found incompetent. For those who are found incompetent, like respondents here, their limitations severely constrain an attorney's ability to provide ethical and effective representation. Because the habeas petition belongs to the client, not counsel, the attorney carries specific duties with respect to the case, which are difficult, if not impossible, to fulfill without the active and able participation of the client. These include fact investigation, evaluation of the accuracy of the state court rulings and fact-findings, and determination and consideration of what may have transpired in

the proceedings but may not have been captured in the record. The second part of this brief illustrates the sort of problems that occur when a prisoner is held incompetent to participate in the proceedings, particularly in the needed development of facts at the federal writ level. These case stories demonstrate why it is necessary and appropriate for the district court to evaluate whether the habeas petition may proceed, given the client's condition.

4. Guided by section 2254 and other statutes, federal habeas courts root out unconstitutional death sentences and convictions. But they do so only with the participation of the litigants – the State, the prisoner's lawyer, and the prisoner. The reliability of their decisions would come into question if courts were forced to adjudge petitions with incompetent petitioners. A death-sentenced prisoner cannot be made an inanimate object, moved like a mere component of the court record through lawyer-driven litigation. He is instead a still-living, breathing person, with the combination of unique factual knowledge and unique motive that make his active involvement in the litigation vital.

The Court should affirm the judgments below.

ARGUMENT

I. COMPETENT DEATH-ROW PRISONERS CAN AND DO PLAY A CRITICAL ROLE IN HABEAS PROCEEDINGS.

The procedural and factual complexity of capital habeas litigation is well-known. *See, e.g., Martel v. Clair*, __ U.S. __, 132 S. Ct. 1276, 1285 (2012) (quoting Congress's statutory recognition of the "unique and complex nature of the litigation" in

18 U.S.C. § 3599 (d) (2006 ed.)). Before the constitutionality of a condemned prisoner's conviction or sentence may be even addressed, various rules, designed in part to uphold federalism and finality, must be followed. Some rules come from this Court's jurisprudence. *See, e.g., Teague v. Lane*, 489 U.S. 288 (1989). Others come from Congress, including most notably the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214.

The merits briefs of the States in these matters assume that prisoners have little to offer in this process, except as witnesses. Pet. Ryan Br. 14-15; Pet. Tibbals Br. 25-26. As discussed below, however, competent death-row prisoners can – and have – played a critical role in habeas actions in assuring both the procedural fairness and factual accuracy of the proceedings.

a. Protective responses to attorney failures

As is familiar, a state prisoner must file his federal writ within one year of the petition becoming final in the state court, with the clock tolled during the pendency of properly filed state post-conviction motions. § 2244(d)(1).

A death-row prisoner may elect to rely on his counsel to calculate the deadline and timely file a meaningful writ. But recent history teaches that he would do so at considerable risk. The Court described the attorney-client relationship as one of agency in *Coleman v. Thompson*, 501 U.S. 722, 753 (1991). Absent extraordinary circumstances, *see Holland*, 130 S. Ct. at 2562-63, the prisoner will pay the price for the attorney's failure to file on time.

This juncture of the habeas litigation is the first of many in which the prisoner's competent participation can mean the difference between success or failure, life or death. As shown in the examples below, mentally competent prisoners have managed to overcome the failings of counsel who neglected to file their petitions, filed them late, or filed incomplete or inadequate petitions.[3]

1. Albert Holland might have sat in his Florida death-row cell and awaited word whether his appointed attorney had timely filed Holland's federal habeas petition (and for that matter the result of the petition). But Holland did not passively rely upon counsel. Rather, he did everything he could to protect himself. His effort proved central to the ultimate grant of relief in his case. *See Holland*, 130 S. Ct. at 2558.

Holland wrote his attorney "many letters emphasizing the importance" of filing a timely federal petition. *Id.* at 2552. He specifically asked his attorney "to make certain that all of his claims would be preserved for any subsequent federal habeas corpus review." *Id.* at 2555. He frequently contacted the Florida Supreme Court to learn the date it would (as he expected) deny his pending state post-conviction petition. *Id.* at 2555-56. That date was of great interest because, upon its denial, Holland would have had only twelve days left under AEDPA's one-year statute of limitations. *Id.* at 2556.

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[3] These examples are intended to sketch the outlines of the broad range of ways in which a competent prisoner may contribute to his habeas case. In particular, this Court's recent cases demonstrate the surprising ways in which prisoners may be required to rise to their own defense in these proceedings.

When Holland learned, through his prison library research, that the court had denied his petition some five weeks earlier, he immediately wrote out his own *pro se* federal habeas petition and mailed it to the district court. *Id.* at 2557.

Holland could try to protect himself only because he was able to research and understand the law. Indeed, he sought to teach the law to his deficient lawyer: in his letters to counsel, he "[i]dentified the applicable legal rules" as well as the due date of the petition. *Id.* at 2552. When Holland disagreed with counsel about whether the petition would be tolled under AEDPA, he told counsel in a letter. And as this Court noted, while Holland "was right about the law," his lawyer "was wrong." *Id.* at 2558.[4]

Based on Holland's actions, the State agreed that he had exercised the requisite "due diligence" for equitable tolling of his tardy habeas petition. *Id.* at 2565. This Court concurred and remanded to the Eleventh Circuit, *see id.*,[5] which in turn remanded to the district court. *Holland v. Florida*, 613 F.3d 1053 (11th Cir. 2010). The district court then resolved the tolling issue in Holland's favor, heard the petition on the merits, and held that he was entitled to relief

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[4] *Holland* presents an extreme example, but – in amici's experience – it is not uncommon for attorneys and clients to engage in dialogue about the law, and for clients to meaningfully advance the litigation, substantively or procedurally, when capable counsel is responsive.

[5] In *Holland*, this Court defined for the first time the extraordinary circumstances required for equitable tolling and remanded to the Eleventh Circuit to apply this new standard. *Id.* at 2565.

because he had unconstitutionally been denied his right to self-representation during the capital trial at which he had been sentenced to death. *See Holland v. Tucker*, __ F. Supp. 2d __, 2012 WL 1193294, *30 (S.D. Fla. April 03, 2012) (finding unreasonable application of *Faretta v. California*, 422 U.S. 806 (1975)). Holland now awaits a new trial, rather than execution.

If Holland had been mentally incompetent, like Carter and Gonzales, it is highly doubtful that his attorneys' errors would have ever been brought to light and he might never have been afforded the federal habeas review that ultimately remedied his unconstitutional capital trial.

2. Quintin Jones, who was sentenced to death in Texas, has also played a critical role in protecting his rights through active participation in his habeas litigation. *See generally Jones v. Thaler*, Case No. 4:05-cv-00638 (N.D. Tex) (docket and documents cited available on PACER).

During the pendency of his state post-conviction proceedings, Jones wrote his attorney at least eight times, requesting that the attorney look into various issues. *Jones*, Document 86, at 9. For example, Jones wrote in an early letter: "I don't know if you know about the *Wiggins* [*v. Maryland*, 539 U.S. 510 (2003)] case? Or the *Atkins* [*v. Virginia*, 536 U.S. 304 (2002)] case? What I'm saying I don't think or feel that my mental and social historys [sic] were really looked into . . . and I really think those cases would play a big role in my case if my history is really looked into and told the way it should have been . . ." *Id.* at 9. Initially, his lawyer failed to

respond; then, the lawyer failed to include the claims in his post-conviction application. *Id.* at 9-10.

When Jones learned that the Texas high court had denied that application, it was only because the State Attorney General's Office had copied him on a letter to his counsel. *Id.* at 4, 10. By this time, only six months remained on AEDPA's one-year clock. Jones immediately, and unsurprisingly, told counsel that he did not want him to continue on the case in the federal courts. *Id.* at 10. Jones also wrote the district court and asked that his counsel not be appointed on the federal case. *Id.* at 19. The court, however, appointed the lawyer over Jones's objection. *Id.* at 20.

The attorney again failed Jones. He filed the writ out of time and failed to respond to the State's motion to dismiss it, resulting in dismissal of the writ. *Id.* at 4-5.

On Jones's prompting, the district court later appointed new counsel, who immediately moved for relief from judgment, citing Jones's diligence in protecting and asserting his own rights. *Jones*, Document 35, at 18. The district court granted the motion and allowed new counsel to respond to the State's dismissal motion, which he did, arguing that the time for filing Holland's petition should be equitably tolled due to attorney abandonment. *Jones*, Document 86, at 5. That issue reached the Fifth Circuit, which remanded to the district court to consider Jones's request under *Holland, supra*. *See Jones v. Thaler*, 383 F.Appx. 380 (5th Cir. 2010).

At this time, that issue remains pending in the district court. And Jones remains alive. If

incompetent like Carter and Gonzales, he could not have taken the steps that have so far saved his life and allowed him a chance at federal review.

3. Chris Shuffield is another Texas death-row inmate whose ability to stand up for himself, in the face of attorney incompetence, has probably saved his life. *See Shuffield v. Thaler*, 6:08-cv-180 (E.D. Tex) (docket and documents cited available on PACER and on file with author).

After the Texas Court of Criminal Appeals denied his state post-conviction motion, Shuffield knew he needed better counsel,[6] and asked his attorney to withdraw from his anticipated representation in federal habeas proceedings. The attorney agreed, and the district court appointed new counsel. *Shuffield*, Document 1, at 1, ¶ 4; *Shuffield*, Document 19 (Order Granting Motion to Substitute New Counsel), at 1. But new counsel did no better.

New counsel filed a "skeletal petition" that contained "numerous typographical errors, and . . . nearly all of the arguments . . . were 'boilerplate' contentions which appear to have been copied from an application filed on behalf of a different inmate." *Id.* at 2. Shuffield then filed a *pro se* motion asking that counsel be substituted. *Id.* Counsel responded by sending Shuffield a "corrected" version, which Shuffield reported was "worse than the original skeletal application." *Id.* at 2. Noting this shoddy

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[6] The attorney filed only three claims, none of which were cognizable. *See Ex parte Shuffield*, Order, Case No. WR-69454-01, 2008 WL 1914747, *1 (Tex. Crim. App. April 30, 2008) (unpublished) ("Applicant has not raised any cognizable claims. Relief is denied.").

work, the district court again granted Shuffield's motion to substitute counsel. *Id.* at 3.

Shuffield's partnership with his second replacement counsel appears to have worked out better. The district court has granted substitute counsel's motion under *Rhines v. Weber*, 544 U.S. 269, 276-78 (2005), to stay the habeas proceedings so that he could return to state court to exhaust a claim under *Brady v. Maryland*, 373 U.S. 83 (1963). *Shuffield*, Document 47, at 6. And the Texas Court of Criminal Appeals has recently found "that the requirements for consideration of a subsequent application have been met and . . . remanded [the case] to the trial court for consideration of" this claim. *Ex Parte Shuffield*, Order, Case No. WR-69454-01, 2012 WL 130275 (Tex. Crim. App. Jan. 11, 2012).

Like Holland and Jones, Shuffield remains alive and his case remains in litigation. But if he had been mentally incompetent when professionally incompetent attorneys were handling his case, he could well have lost, if not his life, at least his opportunity for important federal habeas review of his conviction and death sentence.

b. Petitioner involvement in evidentiary hearings

Even in the wake of *Cullen v. Pinholster*, __ U.S. __, 131 S. Ct. 1388 (2011), this Court has acknowledged a continuing need for evidentiary hearings in some circumstances. *Id.* at 1401. *See also id.* at 1412 (Breyer, J., concurring in part and dissenting in part) (suggesting scenarios in which

hearings would be appropriate).[7] As the Court is well aware, the condemned prisoner has the right to be present for an evidentiary hearing. *See* 28 U.S.C. §2243 (guaranteeing prisoner's right to be present at evidentiary hearing); *Johnson v. Eisentrager*, 339 U.S. 763, 778 (1950) (noting that presence of petitioner at hearing "is inherent in the very term 'habeas corpus'"). In order to exercise that right, the prisoner must, of course, be competent. *See* U.S. Br. 29. If he is not, he will be unable to follow witness testimony, inform counsel if the testimony appears untruthful or inaccurate, propose lines of cross-examination and, in some cases, take the witness stand and testify himself. It is, therefore, beyond any reasonable dispute that when a court holds an evidentiary hearing, "a capital prisoner's testimony or assistance might be crucial to a potentially

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[7] When appropriate, lower courts have approved evidentiary hearings post-*Pinholster*. *See, e.g., Winston v. Pearson*, __ F.3d __, 2012 WL 2369481, at *7-11 (4th Cir. June 25, 2012) (rejecting State's new argument under *Pinholster* and reaffirming *Winston v. Kelly*, 592 F.3d 535, 552-53 (4th Cir. 2010) (finding no abuse of discretion to hold hearing on colorable *Atkins* claims on which the state court had never provided a hearing)); *Lee v. Glunt*, 667 F.3d 397, 406-07 (3rd Cir. 2012) (remanding to district court and granting discovery and possible evidentiary hearing depending on outcome of discovery); *Thompson v. Parker*, No. 5:11–CV–31, 2012 WL 1567378, at *4-6 (W.D. Ky. May 2, 2012) (granting evidentiary hearing to death-sentenced inmate in Kentucky whose federal claim had not been addressed on the merits during state-court review); *Brumfield v. Cain*,__ F. Supp. 2d __, 2012 WL 602163, at *11-12 (M.D. La. Fed. 23, 2012) (rejecting State's claim that, under *Pinholster*, evidentiary hearing already held by district court was improper because state court decision on federal claim satisfied both § 2254 (d)(1) and (d)(2), and granting habeas relief).

meritorious habeas claim." *Id.* *See also* Resp. Carter Br. 30-37.

To be effective, however, a prisoner's involvement in the proceeding can and must begin long before an evidentiary hearing is even granted. As this Court has noted, the course of an investigation "depends critically" on information obtained by counsel from the client. *Cf. Strickland v. Washington*, 466 U.S. 668, 691 (1984). As a result, a prisoner in habeas proceedings must be and remain competent throughout the course of representation, so that he may suggest investigation to conduct and witnesses to interview to develop claims that might warrant a hearing. The case law illustrates how important a competent client's input in an investigation may be. *See, e.g., Johnson v. Secretary, Dep't of Corrections*, 643 F.3d 907, 933 (11th Cir. 2011) (describing case as one "in which counsel failed to adequately investigate what his client did tell him"); *Goodwin v. Johnson*, 632 F.3d 301, 319 (6th Cir. 2011) (in finding inadequate investigation by trial counsel after evidentiary hearing, noting that counsel "had little contact with [the client] and his family . . ."); *Lockett v. Anderson*, 230 F.3d 695, 712 (5th Cir. 2000) (relying, after evidentiary hearing, in part on client's statement that counsel "only met me twice in the entire time he was preparing my cases" to find inadequate investigation).

It is not enough that the client be competent at the outset of representation, and then competent again at the hearing. Both the attorney-client relationship and the development of the case require collaboration during the interim, particularly in the

run up to a hearing. *See* Br. for American Bar Association as *Amicus Curiae*.

c. Participation in fact-bound determinations in federal litigation looking back on state-court proceedings

Under AEDPA, a federal habeas court reviews the state court decision not only to see if it is contrary to, or involves an unreasonable determination of, clearly-established federal law, § 2254 (d)(1), but also to decide if it involved "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254 (d)(2).[8] Such factual review is necessarily aided by the participation of the prisoner who can assist counsel in identifying facts relevant to his federal claims from what can be a "voluminous record," *Miller-El v. Dretke*, 545 U.S. 231, 256 n.15 (2005), interpreting the cold state record, and seeing that the state record before the federal court is complete.[9]

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[8] A preliminary question before the section 2254 (d) analysis is purely factual: did the state courts rule on the federal claim? *See Cone v. Bell*, 556 U.S. 449, 472 (2009) ("Because the Tennessee courts did not reach the merits of Cone's *Brady* [*v. Maryland*, 373 U.S. 83, 83 (1963)] claim, federal habeas review is not subject to the deferential standard that applies under AEDPA . . . [and instead] . . . the claim is reviewed de novo."). When they have not, the federal court will be forced into the position of the first review court to address the factual aspects of the federal claim. *Id.* at 473-76 (engaging in fact-intensive analysis of materiality of evidence suppressed by State). Here, again, prisoner participation is inherently important.

[9] What constitutes the state record to be reviewed under section 2254(d) is not always self-evident. *See, e.g., Miller-El*, 545 U.S. at 241 n.2 & 256 n.15 (conducting analysis under § 2254 (d)(2)

Section 2254 (d)(2) review is a key component of AEDPA, requiring the federal court to determine whether a state court's decision rested on an unreasonable determination of the facts. Although this provision contemplates respect for state judgments, it does not *preclude* a finding that the state court's factual determinations were unreasonable. *See, e.g., Miller-El*, 545 U.S. at 240, 266 (finding state courts' ruling that the prosecutor's peremptory challenges were not "racially determined" an unreasonable determination of the facts in light of the evidence presented in the state proceedings).[10] A federal court's review of the state

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and considering "juror questionnaires, along with juror information cards, . . . added to the habeas record after the filing of the petition in the District Court" and observing "it is not clear to what extent [this] material expands upon what the state judge knew"); *id.* at 279 (Thomas, J., dissenting) (stating that the majority "bases its decision on juror questionnaires and juror cards that Miller-El's new attorneys unearthed during his federal habeas proceedings and that he never presented to the state courts"). *See also* Rule 7(b), Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254 (permitting, under designated circumstances, the district court to expand the record under review).

[10] *See also Wiggins v. Smith*, 539 U.S. 510, 528 (2003) (finding the state court erred in using pre-*Atkins* sentencing evidence related to competency to decide an *Atkins* issue and thus made "an unreasonable determination of the facts in light of the record evidence (or lack thereof) before it in violation of § 2254(d)(2)."); *Brumfield*, __ F. Supp. 2d __, 2012 WL 602163, at *11; *Ben-Yisrayl v. Davis*, 431 F.3d 1043, 1049 (7th Cir. 2005) (finding unreasonable determination of facts involving prosecutor's comments at trial); *Norton v. Spencer*, 351 F.3d 1, 7 (1st Cir. 2003) (finding unreasonable determination of facts involving affidavit submitted in state courts).

court's application of federal *law* to the given facts under Section 2254 (d)(1) can also involve thorny factual issues. *See, e.g.*, *Wiggins*, 539 U.S. at 532-34 (finding, after extensive review of the facts, including seemingly conflicting facts, that by "deferring to counsel's decision not to pursue a mitigation case despite their unreasonable investigation, the Maryland Court of Appeals unreasonably applied *Strickland*").

Fact-bound inquiries require a competent prisoner. State post-conviction counsel often changes when the case moves to federal court. A prisoner's memory of facts and nuances (such as the demeanor of a witness on the stand if there was a hearing) are as critical to effective representation and fact determination in federal habeas as in the earlier assessment of trial.

These backward-looking reviews are informed by the client's real-time experience of the events documented in the cold record. And, as the Court has repeatedly recognized, the cold record does not always tell the whole story. *See Skilling v. United States*, 130 S. Ct. 2896, 2918 (2010) ("In contrast to the cold transcript received by the appellate court, the in-the-moment voir dire affords the trial court a more intimate and immediate basis for assessing a venire member's fitness for jury service."); *Snyder v. Louisiana*, 552 U.S. 472, 490 (2008) (Thomas, J., dissenting) ("The trial court, *with the benefit of contextual clues not apparent on a cold transcript*, was better positioned to evaluate whether Ms. Scott was merely soft-spoken or seemed hesitant in her responses.") (emphasis added); *Uttecht v. Brown*, 551 U.S. 1, 17 (2007) ("We do not know anything about

his demeanor, in part because a transcript cannot fully reflect that information but also because the defense did not object to Juror Z's removal.").

The prisoner's perspective of the state proceedings under federal review thus will often be indispensable.

d. *Prisoner's role in questions of procedural default*

A state prisoner seeking federal habeas review of federal claims must demonstrate that any state procedural defenses were not proper bars to review, as federal habeas review will generally not be available if the state court rejected the claim based on a firmly-established and regularly-followed state procedural rule. *See, e.g., Walker v. Martin*, __ U.S. __, 131 S. Ct. 1120, 1128 (2011). Again, this requires a backward look at the facts of the state-court proceeding. Like any fact-based review, it requires client participation.

1. Eric Clemmons's case provides an example. Clemmons spent over a decade on Missouri's death row for a murder he did not commit. *See generally* http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3110 (last visited on July 25, 2012). His habeas petition hinged on claims that he presented in a *pro se* appeal in state court, but which did not appear in his counseled appeal. The federal district court initially rejected them, but Clemmons was able to persuade the federal appellate court that his claims were not procedurally barred, because they had been raised in his *pro se* brief. *See Clemmons v. Delo*, 124 F.3d 944, 948 (8th Cir. 1997).

If Clemmons had become mentally incompetent between state and federal post-conviction review, the significance of his *pro se* filings might well have been lost and, with it, his one chance at federal review of his unconstitutional trial. [11]

In ruling for Clemmons, the circuit court noted that whatever a lawyer does, the client "is and always remains the master of his cause. Here, Clemmons did the only thing he could do [to preserve a claim his counsel refused to bring]: he tried to bring the issue to the attention of the Missouri Supreme Court himself." *Id.* The court therefore held that "the claim was fairly presented, and that the merits are now open for decision on federal habeas corpus." *Id.* at 949. The court then found Clemmons's constitutional claims meritorious, granted the writ, and ordered that the State release him or provide him with a retrial free from constitutional taint. *Id.* at 956.

Clemmons could not have participated in federal review if, like Carter and Gonzales, he had been incompetent and unable to communicate with his lawyers. Without his active participation in both the state and federal courts, he could well have been executed for a crime he did not commit.

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[11] *Cf. Taylor v. Wilkinson*, 389 F.Appx. 380, 382 (5th Cir. 2010) (noting that the district court did not have a copy of "the complete state court record and specifically did not have a copy of" the prisoner's state post-conviction application, which the prisoner provided to the appellate court). As noted above, for a federal judge reviewing state proceedings to which she was not party, the four corners of the state record are not always readily identifiable. But the same is not true for the prisoner, who was present and party to the state proceedings.

Clemmons never returned to death row. On retrial, the jury acquitted him. *See Clemmons v. Armontrout*, 477 F.3d 962, 965 (8th Cir. 2007).

2. Even if there is a procedural default, the federal claim may still be reviewed if the prisoner can show "cause and prejudice." *Maples v. Thomas*, __ U.S. __, 132 S. Ct. 912, 919 (2012). Again, this requires a factual review of what happened in the state courts, in which client participation is important. *Maples* provides a good example.

Cory Maples waited on Alabama's death row for a decision from the trial court on his post-conviction motion, which had included a claim of ineffective assistance of trial counsel. If the trial court denied the motion, he would inch one step closer to execution and would have just 42 days to file a notice of appeal. *Id.*

But word from his lawyers, associates in a large New York law firm, never came. *Id.* Maples only learned of the trial court's denial when the *state's* attorney wrote him. *Id.* The letter informed Maples of the missed deadline, and notified him that four weeks remained during which he could file a federal habeas petition. *Id.* No copy was sent to Maples's attorneys of record, or to anyone acting on Maples's behalf. It was up to Maples to respond to try to save his appeals and his life. *Id.*

Maples "immediately" contacted his mother, who in turn contacted the law firm. *Id.* at 920. Then, Maples learned that his attorneys had left the firm, and abandoned his case. Different attorneys from the law firm got involved and made attempts to resurrect the time-barred appeal.

The Alabama courts held the ineffectiveness claim time barred, and then the lower federal courts sitting in habeas review held that Maples had procedurally defaulted the claim. *Id.* at 920-21. Ultimately, this Court held that attorney abandonment served as cause for the procedural default.[12] *Id.* at 928.

Maples was able to begin to repair the damage from his attorney abandonment because he read, understood, and acted on the letter from the State's attorney. He could not have done so if he had been incompetent.[13] And, if incompetent at the federal habeas stage, he would have been no help to his attorneys in untangling the fact-bound question of his attorney abandonment in the state courts.

e. *Cause and prejudice due to ineffective assistance of post-conviction counsel*

The district court will sometimes need to engage in a related fact-based cause and prejudice inquiry when the first opportunity a prisoner has to raise a claim of ineffective assistance of trial counsel arises in a state post-conviction proceeding in which he has no Sixth Amendment right to the effective assistance of counsel. Under this Court's recent

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[12] The Court remanded to the Eleventh Circuit to determine whether Maples could show prejudice sufficient to permit his federal claims to proceed. *Id.* at 928. *See also id.* at 922 (explaining cause and prejudice test).

[13] Although the attorney-failure Maples responded to occurred in the state courts, as the Texas cases above show, it could just as easily happened in other cases in the federal courts. In such circumstances, only a competent prisoner would have the capacity to protect his own rights, and in turn his life.

decision in *Martinez v. Ryan*, 566 U.S. __, 132 S. Ct. 1309 (2012), a prisoner in these circumstances who has procedurally defaulted his trial ineffectiveness claim, may show cause and prejudice sufficient to allow federal review of the claim if he had no state right to counsel in this proceeding or if post-conviction counsel was ineffective under the standard of *Strickland v. Washington*, 466 U.S. 668 (1984).

Under *Martinez* then, just as the trial ineffectiveness question is a fact-bound inquiry in which the prisoner would certainly participate at the state post-conviction level, the question of post-conviction counsel's ineffectiveness (necessary to resolve cause and prejudice) is one in which the prisoner would need to communicate with counsel during federal habeas litigation.

The facts of *Martinez* show just how involved a prisoner may need to be in this inquiry. Martinez had one lawyer appointed at trial, and another on direct appeal. *Martinez*, 132 S. Ct. at 1314. Arizona law did not permit appellate counsel to argue on direct appeal that trial counsel was ineffective; such claims are reserved for state collateral proceedings. *Id.* But although Martinez's attorney initiated post-conviction proceedings, she "made no claim trial counsel was ineffective and later filed a statement asserting she could find no colorable claims at all." *Id.*

Martinez then received notice that he would be required within 45 days to file a *pro se* petition in support of the motion for post-conviction relief. *Id.* "Martinez did not respond. He later alleged that he was unaware of the ongoing collateral proceedings and that counsel failed to advise him of the need to

file a *pro se* petition to preserve his rights." *Id.* Based on his inaction and the statement by counsel that he had no colorable claim, the Arizona courts dismissed his post-conviction petition. *Id.* A year and a half later, represented by new counsel, he filed a second notice of post-conviction relief. *Id.*

This Court decided in *Martinez* that the cause and prejudice requirement would be satisfied if post-conviction counsel were found to have performed ineffectively, but the Court did not decide if that were so. *Id.* at 321. Rather, it remanded to the circuit court for a determination of that question. Litigation of this intensely fact-bound claim, in which Martinez himself played a central role, could only proceed with his active participation.

f. *Prisoner role in stay and abeyance*

District courts have the authority, under certain circumstances, to temporarily stay section 2254 proceedings, and to hold the petition in abeyance, so that a prisoner may return to the state courts and exhaust a (theretofore unexhausted) federal claim. *See Rhines v. Weber*, 544 U.S. 269 (2005).

Charles Russell Rhines was a prisoner on South Dakota's death row when he filed his *pro se* petition for a writ of habeas corpus, followed by a *pro se* motion to toll the time on the AEDPA one-year clock. *Rhines v. Weber*, 408 F. Supp. 2d 844, 847-48 (D.S.D. 2005). Later, with appointed counsel, he filed an amended petition and, after the one-year clock had expired, the district court ruled that several of his claims had not been exhausted in the state courts. *Id.* at 846. Rhines asked the court to

stay and abate his habeas petition while he returned to state court to exhaust the claims. *Id.* The district court did so, but the court of appeals reversed.

This Court upheld the authority of district courts to stay and abate petitions while unexhausted claims are pursued in state court, provided that certain conditions are met. *Rhines*, 544 U.S. at 277-78. First, the prisoner must show "good cause" for failing to exhaust the claims in the state courts. *Id.* at 277. Second, he must show the claims were not "plainly meritless." *Id.* Third, "if a [prisoner] engages in abusive litigation tactics or intentional delay, the district court should not grant him a stay at all." *Id.* at 278.

Here again is a fact-intensive test to be resolved in federal habeas review, and one hinging on facts not necessarily in the existing state record. Whether or not claims (never previously heard) are "plainly meritless" requires a fact-based review of the trial or direct appeal; "good cause" for failure to exhaust will require review of state post-conviction proceedings as well. The petitioner's right to proceed with federal review of constitutional claims will be determined by these fact-based inquiries. Professionally competent counsel will, of necessity, depend upon a mentally competent client's memory and understanding of what are often extra-record facts underlying such claims.

For Rhines, these questions were ultimately answered on remand to the district court. *See Rhines*, 408 F. Supp. 2d at 853. The district court engaged in this three-part inquiry, finding that Rhines was "confused" about the exhaustion issues and that his post-conviction counsel had been

ineffective for failure to raise the unexhausted claims. *Id.* The court also commented that Rhines himself had not been derelict in pursuing his claims: "there is nothing in the record to indicate that Rhines's allegations of ineffective assistance of counsel are frivolous or that Rhines should have been aware that his post-conviction counsel should have raised the issues on appeal." *Id.* at 849. The court then conducted a preliminary analysis of the merits of the claims Rhines sought to exhaust in the state courts, all claims involving the facts of his trial, including a claim of ineffective assistance of trial counsel. *Id.* at 850-54. Lastly, in analyzing whether Rhines had engaged in delay tactics, the district court found he had not and cited, in part, Rhines's initial *pro se* filing of his habeas petition.

The analysis of the availability of stay and abeyance in *Rhines* involved facts and questions about which Rhines obviously had peculiar knowledge, and claims which had never before been heard. His participation was undeniably important. But he could not have participated at all – or won his stay and abeyance – if he had been mentally incompetent.

Under *Rhines* then, motions for stay and abeyance are yet another part of the federal habeas landscape involving intensive factual explorations of the state-court proceedings in which the prisoner's participation and ability to communicate is vital.

***

At numerous junctures in the litigation of federal habeas petitions, a death-row prisoner's competent participation can prove crucial. Without

it, the prisoner would risk forfeiting, through no fault of his own, the full and fair federal habeas review that plays "'a vital role in protecting constitutional rights.'" *Holland*, 130 S. Ct. at 2562 (quoting *Slack v. McDaniel*, 529 U.S. 473, 483 (2000)).

II. INCOMPETENT DEATH ROW PRISONERS CANNOT PROVIDE COUNSEL WITH THE NECESSARY ASSISTANCE IN FEDERAL HABEAS PROCEEDINGS.

Given their incompetence, neither Carter nor Gonzales would have been able to protect their own interests or assist counsel, as outlined above. The cases that follow offer additional examples of critical tasks incompetent clients cannot perform during federal habeas proceedings. These incompetent clients were unable to assist in needed fact development, answer questions propounded by the district court, and participate in psychological testing fundamental to resolving their federal claims.

a. Like Cory Maples, Clarence Simmons faced possible execution in Alabama. But Simmons's situation was the reverse of Maples's. Unlike Maples, Simmons was mentally incompetent; unlike Maples's lawyers, Simmons's lawyers were remarkably diligent in protecting him. *See generally Simmons v. Culliver*, Case No. 2:08-cv-00419-RDP (N.D. Ala. Aug. 13, 2008).

Cognitive and neuropsychological testing showed that Simmons had "severe, multi-factoral dementia, as well as potential onset Alzheimer's disease." Motion for Hearing to Determine Competency (on file

with author of this brief), at 2.[14] As a result, Simmons experienced "disorientation to person, place and time, and profound loss of short term memory" as well as "widespread impairment of personal historical memory." *Id.* at 5. In 2004, Simmons had suffered a stroke resulting in additional cognitive impairment, including an inability "to understand simple questions, and the inability of the examiners, at times, to understand Mr. Simmons." *Id.* at 6.

On Simmons's behalf, his federal habeas counsel raised claims of ineffective assistance of counsel and a claim questioning Simmons's competency at the time of trial. There were no hearings in state court on these claims, and "[m]any of the facts necessary to support or litigate these claims [were] in the sole possession and knowledge of Simmons." *Id.* at 8. That left litigation of the factual issues to begin, for the first time, at the federal habeas stage. But counsel was unable to do so with Simmons so incompetent that he could neither understand nor be understood.

Indeed, Simmons was unable to undertake basic tasks asked of him by the district court. In July of 2008, the district court issued an order requiring Simmons to certify that he met with his attorney, understood the concept of "waiver" of claims, and was satisfied with the representation of counsel. *Id.* at 3.

In response to the order, counsel stated that Simmons was not able to comply because Simmons could not understand the content of the order, could

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[14] PACER does not make available the docket or the pleadings in this case, saying merely that the case was "closed 09/01/2011."

not communicate with counsel, and could not comply with his obligations under the order. *Id.* at 18. Counsel explained that the "comprehension required to understand the court's [o]rder reaches far beyond Simmons's present abilities." *Id.*

The order also required counsel to explore with Simmons "'all potential grounds for relief including . . . whether the petitioner was not mentally . . . competent to stand trial.'" *Id.* Counsel explained that "Simmons does not understand the concept of competency. He is unaware that he is currently incompetent and is thus unable to speak in any meaningful way regarding his competency eleven years ago at trial." *Id.*

Finally, the order required Simmons to register complaints about habeas counsel immediately with the court or waive any claim about counsel's incompetence. *Id.* at 19. Counsel, however, explained that Simmons neither recognized counsel after meeting them repeatedly nor understood counsel's job or reason for assisting him. *Id.*

Because Simmons was mentally unable to provide his counsel with the facts they needed to litigate his petition, and unable to provide the district court with what it required of habeas litigants, the district court correctly found Simmons incompetent and, on September 1, 2011, issued an order removing Simmons's case from the active docket.

b. Joe Luis Dansby sat on Arkansas death row, and "refused to meet with either his counsel or mental health professionals employed by his counsel for over two years." *Dansby v. Norris*, No. 02-4141,

2009 WL 485418, at *2 (W.D. Ark. Feb. 26, 2009). As a result of Dansby's refusal, counsel and their experts could not prepare for a scheduled federal hearing on the issue of whether Dansby was mentally retarded and therefore could not be executed under *Atkins v. Virginia*, 536 U.S. 304 (2002).

The district court noted that Dansby "must be able to communicate and cooperate with counsel and mental health professionals to elicit information to support his claim of mental retardation; at a minimum, [he] must be able to participate in a mental health evaluation on the issue of intelligence." *Id.* at 2. Based on this need, the court granted Dansby's counsel's motion to allow a cell-side visit by their mental health expert. *Id.* at 3. Currently, all litigation is stayed until the district court determines if Dansby is competent to proceed.

Jack Gordon Greene is also on Arkansas's death row. And his lawyers also believe he is mentally retarded. *See generally Greene v. Norris*, No. 5:04-cv-00373-SWW (E.D. Ark.) (docket and cited documents available on PACER).

Greene testified in the federal court that he wished to withdraw his *Atkins* claim. *Greene*, Document No. 101 (Order), at 1. His attorneys told the court that Greene "lacks the capacity to appreciate his position and make a rational choice with respect to pursuing or abandoning an *Atkins* claim and that Greene is incompetent to proceed with any aspect of this litigation." *Id.* The district court ordered that Greene be taken to a medical facility for evaluation. *Id.* at 2.

In both cases, the factual issue of mental retardation requires resolution at the federal habeas stage. And in both cases, possible mental incompetence makes the prisoners' knowing, intelligent and voluntary participation in the *Atkins* claim impossible. But for a district court's ability to stay proceedings due to a habeas petitioner's incompetence, these prisoners and others like them would be at risk of being executed without ever having a full and fair hearing under *Atkins*.

c. In 2001, while on Nevada's death row, Michael Mulder suffered a stroke. As a result, he has "irreversible brain damage, is intellectually disabled (mentally retarded), has receptive and expressive aphasia, is incompetent, cannot assist counsel" and "cannot direct or meaningfully participate in his federal habeas proceedings." Petitioner's Pre-Hearing Brief Regarding Counsel's Motion To Stay Federal Habeas Corpus Proceedings at 3, *Mulder v. McDaniel*, 3:09-cv-00610-PMP, 2011 WL 4479771 (D. Nev. filed July 20, 2011) (docket and documents cited available on PACER).

These problems arose during state post-conviction proceedings, when post-conviction counsel was trying to elicit information needed to litigate Mulder's claim of ineffective assistance of trial counsel. *Mulder*, Document 71 (Evid. Hr'g Tr.) at 451-52. Mulder's stroke caused him great difficulties in communicating with post-conviction counsel. *Id.* at 436-37. Indeed, counsel would later testify that Mulder had been incapable of assisting him with these fact-intensive post-conviction claims. *Mulder*, Document 71 at 452. Counsel's motion to stay the litigation due to Mulder's incompetency, was

however denied. *Mulder*, Document 74 (Order Granting Stay), at 2.

In 2009, Mulder was appointed federal habeas counsel, who experienced the same communication issues. Counsel was particularly concerned with his ability to raise a claim of ineffective assistance of counsel given that the issue had not been raised on direct appeal, *Mulder*, Document 74, at 2, and had only been raised in post-conviction under similarly inadequate circumstances: that is, uninformed by any meaningful conversation with Mulder.

Under these circumstances, the district court found Mulder incompetent because he is unable to rationally communicate with his lawyer concerning claims that require his participation. *Mulder*, Document 74 (Order Granting Stay), at 31.

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A mentally competent death-row prisoner can contribute in multiple ways in the process of federal habeas review. The judge hearing such claims can do her job with confidence that the attorneys have not missed or misinterpreted important facts crucial to the federal claim. The attorney with a competent client has a partner with first-hand knowledge of crucial facts and the motivation to see that those facts come to light. And the State can draw comfort knowing that the adversarial process in a life-and-death case has been fair and complete. But without the prisoner's competent participation, the prisoner risks losing what is "likely his single opportunity for federal habeas review of the lawfulness of his imprisonment and of his death sentence." *Holland*, 130 S. Ct. at 2564. As Respondents Carter and

Gonzales have shown, district courts should be entrusted with the authority to manage this risk by staying petitions of incompetent death-row prisoners when necessary.

CONCLUSION

The judgments below should be affirmed.

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Dated: July 26, 2012

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Nos. 10-930 & 11-218

IN THE
Supreme Court of the United States

CHARLES L. RYAN, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

ERNEST VALENCIA GONZALES,
Respondent.

TERRY TIBBALS, WARDEN,
Petitioner,

v.

SEAN CARTER,
Respondent.

On Writs of Certiorari
to the United States Courts of Appeals
for the Ninth and Sixth Circuits

BRIEF OF AMERICAN PSYCHIATRIC ASSOCIATION AND AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Clark v. Arizona, 548 U.S. 735 (2006) 2

Cullen v. Pinholster, 131 S. Ct. 1388 (2011) 6

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Dusky v. United States, 362 U.S. 402 (1960) 16

Ford v. Wainwright, 477 U.S. 399 (1986) 1, 3, 4, 6, 7, 14, 22

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McCleskey v. Zant, 499 U.S. 467 (1991) 6-7

Panetti v. Quarterman, 551 U.S. 930 (2007) 1, 4, 6, 8, 22

Penry v. Johnson, 532 U.S. 782 (2001) 2

Rhines v. Weber, 544 U.S. 269 (2005) 3, 5, 8, 11, 21

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Schriro v. Landrigan, 550 U.S. 465 (2007) 11

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OTHER MATERIALS

ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS (1989) 11

ABA Task Force on Mental Disability and the Death Penalty, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 668 (2006) 10, 11

AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. Text Revision 2000) 13, 14, 17

PAUL S. APPELBAUM & THOMAS G. GUTHEIL, CLINICAL HANDBOOK OF PSYCHIATRY AND THE LAW (4th ed. 2007) 15

Robert P. Archer et al., *A Survey of Psychological Test Use Patterns Among Forensic Psychologists*, 87 J. PERSONALITY ASSESSMENT 84 (2006) 15

Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 CATH. U. L. REV. 1169 (2005) 8

Jennifer L. Kunst, *Understanding the Religious Ideation of Forensically Committed Patients*, 36 PSYCHOTHERAPY 287 (1999) 13

Bruce G. Link et al., *Real in Their Consequences: A Sociological Approach to Understanding the Association between Psychotic Symptoms and Violence*, 64 AM. SOC. REV. 316 (1999) 13

GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS (3d ed. 2007) 14, 15, 16, 17, 20, 21

Douglas Mossman et al., *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, 35 J. AM. ACAD. PSYCHIATRY & L. S3 (Supp. 2007) 13

Douglas Mossman et al., *Quantifying the Accuracy of Forensic Examiners in the Absence of a "Gold Standard,"* 34 LAW & HUM. BEHAV. 402 (2010) 16, 17

Randy K. Otto, *Challenges and Advances in Assessment of Response Style in Forensic Examination Contexts*, *in* CLINICAL ASSESSMENT OF MALINGERING AND DECEPTION 365 (Richard Rogers ed., 3d ed. 2008) 18, 19

Gianni Pirelli et al., *A Meta-Analytic Review of Competency to Stand Trial Research*, 17 PSYCHOL. PUB. POL'Y & L. 1 (2011) 14, 15, 17

Ronald J. Tabak, *Overview of Task Force Proposal on Mental Disability and the Death Penalty*, 54 CATH. U. L. REV. 1123 (2005) 9

XI *The Oxford English Dictionary* (2d ed. 1989) 6

Michael J. Vitacco et al., *An Evaluation of Malingering Screens with Competency to Stand Trial Patients: A Known-Groups Comparison*, 31 LAW & HUM. BEHAV. 249 (2007) 18, 19

INTEREST OF *AMICI CURIAE*[1]

Amicus American Psychiatric Association ("APA"), with more than 36,000 members, is the Nation's leading organization of physicians specializing in psychiatry. APA has previously filed briefs for this Court's consideration in similar cases, including *Panetti v. Quarterman*, 551 U.S. 930 (2007); *Sell v. United States*, 539 U.S. 166 (2003); and *Ford v. Wainwright*, 477 U.S. 399 (1986). APA's members are physicians engaged in treatment, research, and forensic activities, and many of them regularly perform roles in the criminal justice system. APA and its members have substantial knowledge and experience relevant to the issues in this case. APA also has an interest in ensuring that this Court's decisions that concern individuals with mental disorders and disabilities are informed by the best available scientific knowledge.

In addition, as Part II of this brief sets forth in greater detail, APA has previously taken a position as a matter of policy on the question presented in this case. In 2003, the American Bar Association ("ABA") established a Task Force on Mental Disability and the Death Penalty (the "Task Force"), which

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* also represents that all parties have consented to the filing of this brief. Petitioner and respondent in No. 11-218 and respondent in No. 10-930 have filed with the Clerk letters granting blanket consent to the filing of *amicus* briefs; a letter reflecting the consent of petitioner in No. 10-930 is being submitted contemporaneously with the filing of this brief.

included mental health professionals who were members and representatives of APA.

The Task Force was convened in light of this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). Its function was to address unresolved issues concerning the application of the death penalty to persons suffering from impaired mental conditions. As relevant here, the Task Force recommended essentially that post-conviction proceedings initiated by a capital prisoner should be suspended when a mental disorder or disability prevents the prisoner from understanding his situation or communicating with his counsel, and when such communication would be necessary to the fair adjudication of that prisoner's legal challenges to his conviction or sentence. APA, ABA, and several other organizations adopted this recommendation, which is attached as an Addendum to this brief. APA has an interest in presenting arguments in support of its position to this Court.

Amicus American Academy of Psychiatry and the Law ("AAPL"), with approximately 1,800 psychiatrist members dedicated to excellence in practice, teaching, and research in forensic psychiatry, has participated as an *amicus curiae* in, among other cases, *Brown v. Plata*, 131 S. Ct. 1910 (2011); *Indiana v. Edwards*, 554 U.S. 164 (2008); *Clark v. Arizona*, 548 U.S. 735 (2006); and *Penry v. Johnson*, 532 U.S. 782 (2001).

SUMMARY OF ARGUMENT

This Court has long recognized that federal district courts have inherent power to stay proceedings before them, and it has recently reaffirmed in *Rhines v. Weber*, 544 U.S. 269 (2005), that this discretionary stay authority extends to federal habeas cases. District courts can and should use that stay authority – consistently with venerable common law principles – to assure the reliability and integrity of habeas proceedings. That assurance is much needed when prisoners who have been sentenced to death are prevented by mental disorder or disability from necessary communication with counsel. Justice Powell's concurring opinion in *Ford v. Wainwright*, 477 U.S. 399 (1986), reinforces the importance of competency during post-conviction review, because Justice Powell relied on such review as part of a comprehensive process for ensuring the reliability of a conviction before a prisoner is put to death.

When using its stay authority for this purpose, a district court should focus its attention on whether the prisoner seeking habeas relief has shown a lack of the basic competence and ability to communicate with counsel that would be *necessary* for a *fair* resolution of his constitutional challenges to his conviction or death sentence. This standard, formulated by the Task Force and endorsed by APA and several other organizations, reflects an appropriate balancing of the relevant interests. In applying that standard, the district court should give adequate weight to the purposes of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") in promoting comity and finality as part of its discretionary-stay analysis.

Although the decision whether to stay a particular habeas case will necessarily be judicial rather than medical, medical expertise can assist a court in making its determination. The forensic psychiatric analysis of competency to stand trial takes place in an area that has been researched extensively. Available tests for competence developed in the trial context are reliable, validated by studies, and continuing to improve. To the extent petitioners have raised concerns that capital prisoners will malinger or feign symptoms in order to delay execution, these problems are not different in kind from those that forensic practitioners deal with every day. Screening and testing instruments for malingering have been developed and tested, and work on them continues.

Finally, this Court should not be swayed by petitioners' predictions that an affirmance would lead to long-term delay. On the contrary, most defendants who are found to lack competence to stand trial are restored to competence within a reasonable period of time. Many prisoners in cases such as this one will likely return to competence relatively quickly, in much the same way. And, to the extent they continue to lack competence for a longer period, states' interests will be only minimally (if at all) injured, because the kind of long-term mental problem that could foreseeably lead to a truly indefinite stay of execution would be likely to render the individual incompetent to be executed under *Panetti v. Quarterman*, 551 U.S. 930 (2007), and *Ford*.

ARGUMENT

I. DISTRICT COURTS HAVE DISCRETION TO STAY A FIRST FEDERAL HABEAS PROCEEDING WHILE A HABEAS PETITIONER LACKS COMPETENCE BECAUSE OF MENTAL ILLNESS OR DISABILITY

District courts generally have discretionary authority to stay proceedings before them for any number of potential reasons. *See Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936) (Cardozo, J.) (observing that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket"). This Court has recognized that this general principle applies to federal habeas review of state convictions and that discretionary stay authority remains an inherent power of the federal courts in the post-conviction context. *See Rhines v. Weber*, 544 U.S. 269, 276 (2005) (holding that "AEDPA does not deprive district courts of th[e] authority" recognized in *Landis*, though "it does circumscribe their discretion"). Although petitioners and the United States urge this Court to craft and impose strict limits on district court authority to issue stays based on a habeas petitioner's lack of competence resulting from a mental disorder or disability, none of them appears to dispute (at the level of principle) that district courts have authority to impose a stay under sufficiently compelling circumstances.[2]

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[2] *See* Ryan Br. 20-21 ("Some rare circumstances might justify a federal district court's *limited* stay based on the inmate's alleged incompetence."); Tibbals Br. 31 (stating that a district court could impose "a limited stay [that] advances an important objective . . . while imposing minimum delay"); U.S. Br. 29 ("In [certain] circumstances, AEDPA would not necessarily foreclose a stay for a limited period to afford the prisoner the opportunity to regain his competence (on his own or with medication).").

That general discretion is also supported by traditional understandings of procedural fairness and judicial integrity in capital cases. As this Court recognized in *Ford*, one of the key justifications at common law for the requirement that an individual be competent at the time of execution was the inability of an individual lacking such competence to give reasons why he should not be executed. *See Ford*, 477 U.S. at 407 (quoting, among others, Blackstone: "[I]f, after judgment, [the prisoner] becomes of non-sane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution.");[3] Carter Br. 19-20 (collecting additional quotations from Blackstone, Hawles, and Hale).

The modern federal habeas process is designed to discourage (or to prevent outright) prisoners seeking review of their capital convictions from attempting to give such reasons only at the last minute. In particular, AEDPA channels review of post-conviction challenges first into the state courts (as the "main event," *Cullen v. Pinholster*, 131 S. Ct. 1388, 1401 (2011) (internal quotation marks omitted)) and then into the first federal habeas petition, *see* 28 U.S.C. § 2244, with only a few "exceptions." *Panetti v. Quarterman*, 551 U.S. 930, 947 (2007). This staged process presupposes that anything an individual might have to say to the state and federal courts can be said well before execution is imminent. *Cf. McCleskey v. Zant*,

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[3] The term "peradventure" indicates that Blackstone was referring not to any specific cause to believe that a prisoner could make any such allegation, but to a mere "possibility . . . ; uncertainty, [or] doubt." XI *The Oxford English Dictionary* 517 (2d ed. 1989).

499 U.S. 467, 492 (1991) (explaining that unnecessary "second or subsequent federal habeas petition[s]" give rise to a "[p]erpetual disrespect for the finality of convictions [that] disparages the entire criminal justice system").

Indeed, Justice Powell's concurrence in *Ford* argued that the Eighth Amendment standard for competence at the time of execution did not need to include the ability to raise legal or factual objections precisely because any such objections should already have been raised much earlier in the collateral-review process. Justice Powell noted that "[m]odern practice provides far more extensive review of convictions and sentences than did the common law, including not only direct appeal but ordinarily both state and federal collateral review," and including "access to counsel, by constitutional right at trial, and by employment or appointment at other stages of the process whenever the defendant raises substantial claims," all of which made it "unlikely indeed that a defendant today could go to his death with knowledge of undiscovered trial error that might set him free." *Ford*, 477 U.S. at 420 (Powell, J., concurring in part and concurring in the judgment).[4]

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[4] *See also Ford*, 477 U.S. at 420 n.2 (Powell, J., concurring in part and concurring in the judgment) (arguing that a standard that required a defendant to be competent to assist counsel at the time of execution would give too little weight to "States' . . . strong and legitimate interest in avoiding repetitive collateral review through procedural bars"). Petitioner Ryan argues that Justice Powell's opinion in *Ford* weighs against considering competence to assist counsel at the time of post-conviction proceedings because taking that factor into account would "negate the *Ford* standard," which does not require such competence at the time of execution. Ryan Br. 17-18. That argument lacks force if (as appears) Justice Powell found such a requirement

This reasoning presumes that a prisoner who is to be executed has previously had access to the state and federal processes available for raising factual and legal challenges to his conviction and death sentence.[5] After AEDPA, those opportunities still include the "opportunity for . . . federal review" of constitutional challenges to a state conviction, and this Court has recognized the "gravity of th[e] problem" posed for the federal courts when a petitioner "ha[s] no way of controlling" whether such review will occur. *Rhines*, 544 U.S. at 275.[6] To make that opportunity fair and meaningful, federal district courts must retain the ability to stay their proceedings when, because of a prisoner's lack of competence, going forward would render a federal habeas petition a hollow exercise as to important claims.

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unnecessary based on his assumption that fair and reliable post-conviction proceedings had already by that point occurred.

[5] *See* Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 CATH. U. L. REV. 1169, 1178 (2005) (observing that "Justice Powell must have been assuming that prisoners on the threshold of execution have already taken advantage of . . . post-conviction opportunities," but that such an assumption is "warranted . . . only if a prisoner's impaired capacity to assist in post-conviction litigation would have been identified during the post-conviction proceedings" and would have "le[d] the courts to take appropriate precautionary action").

[6] *See Panetti*, 551 U.S. at 946 (explaining that the Court has "resisted an interpretation of [AEDPA] that would 'produce troublesome results,' 'create procedural anomalies,' and 'close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent'") (quoting *Castro v. United States*, 540 U.S. 375, 380-81 (2003)); *cf. Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) (explaining that a "*first* federal habeas petition" embodies the traditional "protections of the Great Writ").

II. A STAY IS APPROPRIATE WHEN NECESSARY TO ENSURE A FAIR RESOLUTION OF SPECIFIC CLAIMS BEARING ON THE VALIDITY OF A CONVICTION OR DEATH SENTENCE

In 2005, APA adopted a position statement entitled Mentally Ill Prisoners on Death Row. As most relevant to this case, the statement proposes the following standard:

> If a court finds at any time that a prisoner under sentence of death has a mental disorder or disability that significantly impairs his or her capacity to understand or communicate pertinent information, or otherwise to assist counsel, in connection with post-conviction proceedings, and that the prisoner's participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence, the court should suspend the proceedings.

Add. 2.[7] APA's position statement was based on the work of a Task Force on Mental Disability and the Death Penalty,[8] formed by ABA in 2003. *See*

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[7] A copy of APA's position statement is attached to this brief as an Addendum. The statement goes on to say that, "[i]f the court finds that there is no significant likelihood of restoring the prisoner's capacity to participate in post-conviction proceedings in the foreseeable future, it should reduce the prisoner's sentence to a lesser punishment." Add. 2. Whether and under what circumstances a federal habeas court can order a sentence reduction on this basis are questions not presented by the present cases.

[8] The Task Force was composed of "professionals knowledgeable in law, psychology, and psychiatry, some of whom [we]re advocates for people with mental disability." Ronald J. Tabak, *Overview of Task Force Proposal on Mental Disability and the Death Penalty*, 54 CATH. U. L. REV. 1123, 1123 (2005).

ABA Task Force on Mental Disability and the Death Penalty, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 668 (2006) ("Task Force Report"). The Task Force's recommendation was adopted not only by APA, but also by ABA, by the American Psychological Association, and by the National Alliance for the Mentally Ill (now known as the National Alliance on Mental Illness). *See id.*

The proposed standard is intended to reflect a balancing of the concerns that apply when competence is assessed in the post-conviction setting, as distinct from those that apply when a defendant's competence to stand trial is in question. It acknowledges that, because a prisoner seeking habeas review of a capital sentence is already the subject of a "presumptively valid" conviction, *Daniels v. United States*, 532 U.S. 374, 382 (2001), it would not be appropriate to forestall the state from executing its sentence without "a substantial and particularized showing that the prisoner's impairment would prevent a fair and accurate resolution of specific claims." Task Force Report 674. The Task Force also made clear, moreover, that "[m]any issues raised in collateral proceedings can be adjudicated without the prisoner's participation, and these matters should be litigated according to customary practice." *Id.*

At the same time, "[t]horough post-conviction review of the legality of death sentences has become an integral component of modern death penalty law," so that "[a]ny impediment to thorough collateral review undermines the integrity of the review process and therefore of the death sentence itself." *Id.* As the Task Force further explained, "this rule 'rests less on sympathy for the sentenced convict than on concern

for the integrity of the criminal justice system,'" especially in light of the "[s]cores of people on death row [who] have been exonerated based on claims of factual innocence, and [the] many more offenders [who] have been removed from death row and given sentences less than death because of subsequent discovery of mitigating evidence." *Id.* at 674-75 (quoting ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 291 (1989) (commentary to Standard 7-5.6)).

In leaving the stay decision within the discretion of the district court, moreover, this Court can provide guidance that its resolution should take into account both "AEDPA's objective of encouraging finality" and the statute's "goal of streamlining federal habeas proceedings." *Rhines*, 544 U.S. at 277. These concerns can and should be part of the determination whether, on the facts of a particular case, a prisoner's participation is necessary for a fair resolution of specific claims identified by his counsel during the period that the prisoner lacks competence. *Cf. Schriro v. Landrigan*, 550 U.S. 465, 473-74 (2007) (explaining that AEDPA has not changed the "basic rule" that "the decision to grant an evidentiary hearing [is] generally left to the sound discretion of district courts," but those courts must "take into account [AEDPA's] standards" in making their decisions). These policies can best be weighed against the loss of the petitioner's personal participation on the case after a careful "appraisal of the facts by the court whose function it is to exercise discretion." *Landis*, 299 U.S. at 258.[9]

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[9] Petitioner Ryan urges that the Court should permit stays only when the claim that a habeas petition cannot press for lack of competence involves an "assertion of actual innocence." Ryan Br. 20-21 (citing *House v. Bell*, 547 U.S. 518 (2006), and *Schlup*

III. FORENSIC EXAMINERS CAN PROVIDE USEFUL INFORMATION TO SUPPORT JUDICIAL DECISIONS IN POST-CONVICTION PROCEEDINGS

The ultimate determination whether a capital habeas case should be stayed on the basis of a prisoner's lack of competence to assist counsel will necessarily be judicial, not medical, in character. That discretion should nevertheless be informed and guided by the judgment of medical professionals for its proper exercise. The types of assistance that such professionals would likely provide, and the tools that they would use to provide that assistance, may inform the Court's decision in this case. These types of assistance would include assessing an individual's ability to assist counsel; detecting individuals who are or may be feigning symptoms in order to delay the legal process; and providing information about the likelihood that an individual who presently lacks the ability to assist counsel will gain or recover that ability within a reasonable time.

In considering the importance of the information that forensic psychiatrists can provide, and the appropriate response to that information by the district

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v. Delo, 513 U.S. 298 (1995)). This suggestion lacks merit because the purpose of the actual-innocence standard that this Court adopted in *House* and *Schlup* is to identify the rare case in which a prisoner has committed a procedural default without cause or has abused the writ, yet the federal courts should nevertheless overlook the prisoner's procedural error in order to avoid a miscarriage of justice. *See House*, 547 U.S. at 536. A prisoner in respondents' position, however, has not triggered a procedural bar, but has (through counsel) sought timely relief based on a temporary inability to invoke the writ's protections in the first instance. That situation is not comparable to the ones this Court addressed in *House* and *Schlup*.

courts, the Court should bear in mind that serious mental disorders, including schizophrenia and bipolar disorder, can interfere with the ability to assist counsel in a variety of ways. Delusion ideation in particular may lead a prisoner to misconstrue his situation.[10] Driven by paranoid ideation, a prisoner might conclude that his attorney is in fact conspiring against him and cannot be trusted;[11] or, under the influence of a grandiose delusion, he may believe that, because he is God's agent on earth, he cannot be harmed and will be released, and therefore an appeal need not be pursued.[12] Hallucinatory voices may warn the prisoner against cooperating with his

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[10] *See generally* APA, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 299 (4th ed. Text Revision 2000) ("DSM-IV-TR") (describing different types of delusions associated with schizophrenia); Bruce G. Link et al., *Real in Their Consequences: A Sociological Approach to Understanding the Association between Psychotic Symptoms and Violence*, 64 AM. SOC. REV. 316, 316 (1999) (proposing that "people's definitions of situations shape their behavior" and so have real consequences, even when those definitions are delusional).

[11] *See, e.g.*, Douglas Mossman et al., *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, 35 J. AM. ACAD. PSYCHIATRY & L. S3, S49 (Supp. 2007) (advising that it is appropriate to include a diagnosis of "paranoid schizophrenia" in a forensic report in order to make clear that a defendant's refusal to "cooperate with his attorney because he irrationally perceives the attorney as plotting against him . . . stem[s] from a well-known form of mental illness and not from quirkiness or unwillingness to cooperate").

[12] *See, e.g.*, Jennifer L. Kunst, *Understanding the Religious Ideation of Forensically Committed Patients*, 36 PSYCHOTHERAPY 287, 294 (1999) (explaining that "[p]atients who believe they are God or will be miraculously saved do not have the felt need to grapple with their real-life situation" and "rarely settle into the difficult task of dealing with the reality of their incarceration").

attorney or threaten him with harm if he does so.[13] The confusion associated with psychosis itself, the result of a tumultuous mixture of delusional perceptions and hallucinatory stimuli, can leave the prisoner unable to attend to his legal situation or to communicate coherently with legal counsel.[14]

A. Assessing an Individual's Ability To Participate in the Legal Process

The assessment of an individual's ability to participate in the legal process is a well-established part of forensic psychiatric practice that has been studied and discussed extensively in professional literature.[15] This study has so far largely occurred in the context of competence to stand trial, which is a different *legal* situation from competence to assist counsel with pursuing post-conviction remedies. The *medical* issues that arise in the two contexts nevertheless overlap

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[13] *See generally* DSM-IV-TR 313-14 (identifying "prominent delusions or auditory hallucinations" as one "essential feature" of paranoid schizophrenia); *cf.* Carter Br. 3 (noting statements in record concerning Carter's hallucinations).

[14] *Cf. Ford*, 477 U.S. at 403 ("[I]n an interview with his attorneys, Ford regressed . . . into nearly complete incomprehensibility, speaking only in a code characterized by intermittent use of the word 'one,' making statements such as 'Hands one, face one. Mafia one. God one, father one, Pope one. Pope one. Leader one.'").

[15] *See, e.g.*, GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS § 6.05, at 141 (3d ed. 2007) ("PSYCHOLOGICAL EVALUATIONS") ("Since 1970, a substantial literature has developed about the nature of the competency evaluation."); Gianni Pirelli et al., *A Meta-Analytic Review of Competency to Stand Trial Research*, 17 PSYCHOL. PUB. POL'Y & L. 1, 3 (2011) ("*Competency Research Review*") (noting that "hundreds of articles and numerous books have been published since the 1960s aimed at developing and refining practice standards in the competency arena").

considerably, so existing studies provide useful information about the types of information that medical practitioners can provide to district courts.

Forensic mental health professionals use a range of different approaches when assessing competence. Competence assessments were historically made on the basis of relatively unstructured interviews, and some still are.[16] A growing number of assessments now rely on more structured methods, however, including systematic clinical evaluations,[17] general protocols that are used in both forensic and non-forensic contexts, and specialized protocols such as the MacArthur Competence Assessment Tool – Criminal Adjudication ("MacCAT-CA") and Evaluation of Competence to Stand Trial – Revised ("ECST-R") that have been developed specifically for use in criminal proceedings.[18]

The MacCAT-CA and ECST-R evaluations each consist of a series of standardized items that are designed to test the subject's ability to understand the legal system on both a factual and a rational level,

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[16] *See* PSYCHOLOGICAL EVALUATIONS § 6.06(b), at 147; Robert P. Archer et al., *A Survey of Psychological Test Use Patterns Among Forensic Psychologists*, 87 J. PERSONALITY ASSESSMENT 84, 91-92 (2006) ("*Psychological Test Use*").

[17] *See* PAUL S. APPELBAUM & THOMAS G. GUTHEIL, CLINICAL HANDBOOK OF PSYCHIATRY AND THE LAW 239-41 (4th ed. 2007) (describing a structured process for evaluating a patient's competence to stand trial).

[18] *See Competency Research Review* 3-4; *Psychological Test Use* 87, 89 & tbl. 9; *see also id.* at 92 (discussing the "marked and continuing popularity of traditional clinical assessment instruments in forensic evaluations," and the "increasing popularity of specialized assessment forensic instruments," though also noting that some "traditional assessment practices are retained in the absence of empirical support").

and to provide assistance to counsel in defending the subject's case.[19] Both were designed to shed light on the factors set forth by this Court in *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam), and were tested in multiple studies.[20] Other protocols perform more specialized functions. For example, the Competency Screening Test is intended not to provide a comprehensive evaluation of an individual's competency to stand trial but instead to "screen" for individuals who appear likely to be of questionable competency and therefore would benefit from a more comprehensive evaluation.[21]

The reliability and quality of competence testing are difficult to demonstrate empirically because the practitioners' findings are ultimately used as an input to a judicial decision, and there is no external means to determine whether the medical information helped the judge rule correctly.[22] Nevertheless, some light can be shed on the issue by comparing different experts' assessment of the same individuals. A recent study using statistical techniques to conduct such a comparison estimated that participating experts could "correctly distinguish a randomly selected competent defendant from a randomly selected incompetent

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[19] *See* PSYCHOLOGICAL EVALUATIONS § 6.06(c)(1), at 149-52 (MacCAT-CA); *id.* § 6.06(c)(2), at 152-54 (ECST-R).

[20] *See id.* § 6.06(c)(1), (2), at 149, 153.

[21] *See id.* § 6.06(a)(1), at 146.

[22] *See* Douglas Mossman et al., *Quantifying the Accuracy of Forensic Examiners in the Absence of a "Gold Standard,"* 34 LAW & HUM. BEHAV. 402, 403 (2010) (discussing the difficulty of determining "how accurate [competency] judgments are" in light of the absence of a "gold standard to establish absolute truth in any particular case").

defendant in 29 out of 30 attempts."[23] Other studies have similarly found that experts tend to reach the same results when assessing the same individuals, which suggests that the criteria they are applying are at least objective and consistent.[24] Other studies have found that only about one-quarter of criminal defendants who are referred for a competency assessment are found to lack competence to stand trial,[25] which suggests that medical evaluations serve as a meaningful check on such claims.

B. Tools for Detecting Malingering

One question of particular concern to practitioners and courts in connection with forensic assessments of mental illness has been the risk that defendants or prisoners who are undergoing assessment for competence may inappropriately delay or even avoid legal proceedings by malingering – that is, by the "intentional production of falsely or grossly exaggerated . . . psychological symptoms, motivated by external incentives." DSM-IV-TR 739.

The threat of punishment in the case of a criminal defendant before trial, or of execution in the case of a prisoner who has been sentenced to death, can

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[23] *Id.* at 409. The study's authors did, however, indicate that more research would be needed to improve the "generalizability of [their] conclusion" and that in the interim it should be "viewed with caution." *Id.* at 402, 412.

[24] *See* PSYCHOLOGICAL EVALUATIONS § 6.05(c), at 145 ("[E]valuations of competency to stand trial [are] usually highly reliable and potentially highly valid, [and] these levels of psychometric rigor can be achieved in a relatively brief interview.").

[25] *Competency Research Review* 28 (after reviewing a large number of quantitative studies, estimating the "base rate of incompetency" among defendants referred for evaluation at 27.5%).

provide an obvious incentive to present false or exaggerated symptoms of a mental disorder or defect. Although neither petitioner in this case discusses malingering extensively, both argue that this Court should constrain or eliminate district courts' ability to stay habeas proceedings for lack of competence to proceed based in part on concerns that prisoners will deliberately delay such proceedings. *See* Ryan Br. 19; Tibbals Br. 28. Similarly, several states contend as *amici* that prisoners will likely raise "frivolous . . . challenge[s]" to competence because it "costs [a habeas] petitioner nothing" to do so. Utah et al. Br. 5.

In evaluating these concerns, the Court should take into account the substantial amount of professional effort that has gone into ensuring that forensic psychiatrists are able to provide the courts with objective evidence about whether a particular individual's symptoms are real or feigned.[26] A number of instruments are available to assess whether an individual is feigning mental disorder or disability. The ECST-R, for example, includes a section that is "designed specifically to assess feigned incompetency."[27]

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[26] *See, e.g.*, Randy K. Otto, *Challenges and Advances in Assessment of Response Style in Forensic Examination Contexts* ("*Challenges and Advances*"), *in* CLINICAL ASSESSMENT OF MALINGERING AND DECEPTION 365, 375 (Richard Rogers ed., 3d ed. 2008) (stating that "considerable gains" have been made "in the understanding and assessment of response style" – a term that includes the detection of malingering). The author indeed argues that forensic mental health professionals have placed *too* much emphasis on malingering and that the field should shift towards a broader understanding of response styles that takes into account other ways in which examinees' responses may not present an accurate picture of their condition. *See id.* at 366.

[27] Michael J. Vitacco et al., *An Evaluation of Malingering Screens with Competency to Stand Trial Patients: A Known-Groups Comparison*, 31 LAW & HUM. BEHAV. 249, 250-51 (2007);

There are also a number of specialized instruments designed specifically to assess the possibility of malingering or otherwise feigned symptoms.[28] These issues have been the focus of considerable research in the last 15 years, and the instruments available can be expected to improve over time.

In light of the information that forensic practitioners can provide to district courts on this issue, APA and AAPL do not believe that the concerns advanced by petitioners justify eliminating or categorically restricting district courts' discretion to stay a habeas case based on a finding that a particular prisoner suffers from a mental disorder or disability that prevents the court from fairly resolving his claims. Instead, district courts should have discretion to deal with such problems on a case-by-case basis.

IV. CONCERNS ABOUT LONG-TERM DELAY DO NOT JUSTIFY CATEGORICAL RESTRICTIONS ON JUDICIAL DISCRETION

Another concern that petitioners and their *amici* press is the risk that allowing district courts broad discretion in staying federal habeas proceedings on competence grounds will lead to long-term delays that are inconsistent with the purposes of AEDPA. *See* Ryan Br. 19 (expressing concern that a prisoner could "stay [federal habeas] proceedings . . . indefinitely if the inmate is found to be incompetent to assist counsel"); Tibbals Br. 29 (warning that discretionary stay authority would be a "mechanism for

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see id. at 258 (finding that the ECST-R is "generally effective at identifying possible cases of malingering").

[28] *See id.* at 252-53 (describing different tests that can be used to detect malingering, of varying length, complexity, and effectiveness); *see also Challenges and Advances* 370-72 (discussing additional tests).

capital prisoners to forestall – and in many cases, frustrate – a State's enforcement of its criminal judgments"); U.S. Br. 27 (arguing that an "indefinite stay issued solely in the hope that the prisoner might some day regain competence" is inconsistent with AEDPA's purposes).[29]

As an initial matter, petitioners offer no evidence to support their suggestion that this problem will arise in "many cases." Tibbals Br. 29. In the pre-trial context, most defendants who are found to lack competence to stand trial recover such competence within a finite period of time.[30] Although it is not clear whether these results can reliably be generalized to include capital prisoners in post-conviction proceedings, as many factors may differ between the two populations, they nevertheless provide a useful benchmark for evaluating issues related to possible restoration of competence.

Petitioner Ryan and the United States argue, however, that stays based on lack of competence will lead to delay because capital petitioners lack an "'incentive to obtain federal relief as soon as possible.'"

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[29] APA and AAPL take the view as a policy matter, as did the Task Force, that, if a district court cannot fairly adjudicate a capital prisoner's habeas petition because of his lack of competence, and there is no reasonable likelihood the prisoner will become competent in the future, the appropriate result is an order reducing the capital sentence to a lesser punishment. *See supra* note 7 (noting that neither prisoner has requested such relief in this case).

[30] *See* PSYCHOLOGICAL EVALUATIONS tbl. 6.6, at 163 (in Florida from 2002 to 2004, 78.5% of defendants were restored to competence within 180 days, and 87.3% within 270 days); *see also id.* (in Michigan from 2002 to 2005, defendants stayed in a hospital for competence restoration an average of 134 days and a median of 100 days).

Ryan Br. 19 (quoting *Rhines*, 544 U.S. at 277-78); U.S. Br. 27 (same). These contentions rest on an implied assumption that the prisoners being discussed have the capacity to perceive their situation, assess their incentives, and behave strategically. In fact, however, the lack of that capacity may be precisely why the individuals are adjudicated incompetent. One textbook gives the real-life example of a pretrial defendant who held the "strong although highly delusional belief that he would go free regardless of the case outcome," because, as the defendant stated:

> "My real name is John Jones Jesus 2000. God has ordered that on January 1, 2000, I be ordained the chief religious order for the state of Florida in a ceremony on the steps of the capital in Tallahassee. If they try to interfere, God will kill all the white people, and they won't stand for that. They'll have to let me go."

PSYCHOLOGICAL EVALUATIONS § 6.06(c)(1), at 151. A capital prisoner holding similar delusional beliefs would be no more likely to delay proceedings intentionally than he would be to participate constructively in them. Indeed, the description in respondent Carter's brief of his "false belief that he could not be executed unless he volunteered," Carter Br. 9, suggests that he would be similarly nonresponsive to incentives in his case.[31]

Further, any threat that indefinite delay will harm legitimate state interests appears slight when

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[31] The members of APA and AAPL who have reviewed this brief have not evaluated respondents and cannot attest to their actual medical condition. The discussion above and on page 22 assumes that the descriptions of respondents' condition by their counsel are true solely for the purpose of illustrating the general points advanced in this brief.

one considers that a prisoner cannot ultimately be executed unless he meets the Eighth Amendment test for competence under *Ford* and *Panetti*. This is a practical argument, not a legal one: as a legal matter, the *Ford* test is distinguishable from the appropriate test for post-conviction proceedings. Nevertheless, it seems likely that many prisoners with mental disorders or disabilities sufficiently severe to render them permanently unable to assist their counsel in post-conviction proceedings would likewise prove unable to comprehend the reasons for their execution.

Taking examples from the present cases, respondent Gonzales's brief states that, at the time of his federal habeas proceedings, he "experienced continuing decline in his mental health," as a result of which he "no longer understood his legal situation, and particularly the impending sentence of death." Gonzales Br. 5. Respondent Carter's brief describes statements in the record that he has lost the ability "'to comprehend or respond to communications from others,'" or to "remember his trial [or] the penalty-phase verdict." Carter Br. 9. These descriptions at least raise significant questions whether these individuals "comprehend[] the meaning and purpose of the punishment to which [they] ha[ve] been sentenced," *Panetti*, 551 U.S. at 960, and therefore whether they could be constitutionally put to death without showing significant medical improvement.

As a result, the interests in finality and promptly executed sentences that petitioners stress so heavily may often be "empty formalit[ies]," *id.* at 946, of the sort this Court has disregarded in the past. The substantive question before the Court is instead: assuming that respondents recover some day to the point where they can understand their situation,

should the courts then permit them to resume their first federal habeas petitions at the point where they left off? Or should those petitions instead be litigated in respondents' effective absence, treating their own memories of what happened at their own trials as mere "missing piece[s] of evidence," Tibbals Br. 31, on which they have no special claim to rely? Nothing in AEDPA requires the latter answer, and concerns for the reliability and integrity of the courts' decision-making processes strongly argue in favor of the former. Accordingly, this Court should adhere to its teaching that it will not "close [its] doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent," *Castro*, 540 U.S. at 381, and hold that the district courts have sufficient discretion to save the claims of capital prisoners such as respondents in these cases.

CONCLUSION

The judgments of the Sixth and Ninth Circuits should be affirmed.

Respectfully submitted,

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ADDENDUM

Add. 1

APA Official Actions

Position Statement on
Mentally Ill Prisoners on Death Row

Approved by the Board of Trustees, December 2005
Approved by the Assembly, November 2005

"Policy documents are approved by the APA Assembly and Board of Trustees . . . These are . . . position statements that define APA official policy on specific subjects . . ." – *APA Operations Manual.*

(a) Grounds for Precluding Execution. A sentence of death should not be carried out if the prisoner has a mental disorder or disability that significantly impairs his or her capacity (i) to make a rational decision to forego or terminate post-conviction proceedings available to challenge the validity of the conviction or sentence; (ii) to understand or communicate pertinent information, or otherwise assist counsel, in relation to specific claims bearing on the validity of the conviction or sentence that cannot be fairly resolved without the prisoner's participation; or (iii) to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case. Procedures to be followed in each of these categories of cases are specified in (b) through (d) below.

(b) Procedure in Cases Involving Prisoners Seeking to Forego or Terminate Post-Conviction Proceedings. If a court finds that a prisoner under sentence of death who wishes to forego or terminate post-conviction proceedings has a mental disorder or disability that significantly impairs his or her capacity to make a rational decision,

the court should permit a next friend acting on the prisoner's behalf to initiate or pursue available remedies to set aside the conviction or death sentence.

(c) Procedure in Cases Involving Prisoners Unable to Assist Counsel in Post-Conviction Proceedings. If a court finds at any time that a prisoner under sentence of death has a mental disorder or disability that significantly impairs his or her capacity to understand or communicate pertinent information, or otherwise to assist counsel, in connection with post-conviction proceedings, and that the prisoner's participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence, the court should suspend the proceedings. If the court finds that there is no significant likelihood of restoring the prisoner's capacity to participate in post-conviction proceedings in the foreseeable future, it should reduce the prisoner's sentence to a lesser punishment.

(d) Procedure in Cases Involving Prisoners Unable to Understand the Punishment or its Purpose. If, after challenges to the validity of the conviction and death sentence have been exhausted and execution has been scheduled, a court finds that a prisoner has a mental disorder or disability that significantly impairs his or her capacity to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case, the sentence of death should be reduced to a lesser punishment.

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 10-930

SUPREME COURT, U.S.
FILED
MAY 3 1 2012
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In The
Supreme Court of the United States

CHARLES L. RYAN, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

ERNEST VALENCIA GONZALES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF ARIZONA VOICE FOR CRIME VICTIMS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Arizona Voice for Crime Victims Inc. ("AVCV") is an Arizona nonprofit corporation that works to promote and protect crime victims' interests throughout the criminal-justice process. To achieve these goals, AVCV empowers victims of crime through legal advocacy and social services. AVCV also provides continuing legal education to the judiciary, lawyers, and law enforcement.[1]

AVCV seeks to foster a fair justice system which (1) provides crime victims with resources and information to help them seek immediate crisis intervention, (2) informs crime victims of their rights under the laws of the United States and Arizona, (3) ensures that crime victims fully understand those rights, and (4) promotes meaningful ways for crime victims to enforce their rights, including through direct legal representation. A key part of AVCV's mission is working to give the judiciary information and policy insights that may be helpful in the sometimes difficult task of balancing an accused's constitutional rights with the crime victim's right to reasonable finality, while also protecting the wider community's need for deterrence.

---

[1] Both Petitioner and Respondent consented to the filing of this amicus curiae brief, and their letters of consent have been filed with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amicus curiae, made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6.

AVCV believes that the Ninth Circuit's ruling in this case fails to properly balance these interests. While other advocates will offer the Court a comprehensive demonstration of the Ninth Circuit's error under existing statutes and caselaw, AVCV submits this brief (1) to articulate the distinct and powerful interest—well recognized under federal and state law—that victims of crime share in the finality of a State's moral judgment, and (2) to demonstrate the injury that Ninth Circuit's decision will inflict on victims' rights and interests, should that decision be allowed to stand.

STATEMENT OF THE CASE

A full procedural background will be set out in the merits briefs, but AVCV hopes to set this amicus brief in context by providing a brief factual and procedural background of this case, which began its odyssey through the legal system 22 years ago. Respondent Ernest Valencia Gonzales was convicted of a murder that took place on February 20, 1990. *State v. Gonzales*, 181 Ariz. 502, 506, 892 P.2d 838, 842 (1995). That evening, Darrel Wagner, accompanied by his wife Deborah and her son, had arrived home to find Gonzales in their townhouse. *Id.* As Darrel entered the house, Gonzales shoved him to the ground and began stabbing him. *Id.* Deborah, after pleading with Gonzales to leave, jumped on the assailant's back and tried to stop the attack. *Id.* A struggle ensued and Gonzales then stabbed Deborah

twice before fleeing. *Id.* Darrel Wagner died that night and Deborah spent five days in intensive care. *Id.* After two trials, Gonzales was convicted of six counts, including felony murder, and then sentenced to death. *Id.* at 506-07, 892 P.2d at 842-43. It was not until six years after the murder, on January 8, 1996, that Gonzales's convictions and death sentence became final. *Gonzales v. Arizona*, 516 U.S. 1052 (1996).

Yet for the next 16 years, the State of Arizona has been prohibited from carrying out Gonzales's sentence because of multiple appeals resulting, eventually, in the indefinite stay order at issue in this case. In November 1999, Gonzales initiated a habeas proceeding in the U.S. District for the District of Arizona. *See* Pet. for Cert. at 4 (citing *Gonzales v. Schriro*, CV99-02016-PHX-SMM at Docs. 1, 3). But the habeas petition went nowhere as Gonzales pursued other appeals and the district court sought to resolve the procedural status of Gonzales's petition. *In re Gonzales*, 623 F.3d 1242, 1244 (9th Cir. 2010). By the time the district court had finally established a deadline for merits briefing in the habeas proceedings, another six years had passed. *Id.* But instead of this case moving toward a resolution, Gonzales's counsel moved to stay the proceedings altogether. *Id.* According to his lawyers, Gonzales's mental condition had deteriorated to the point that he could no longer rationally communicate with counsel and assist them. *Id.* That request led to another four years of briefing and appeals, which culminated in the Ninth Circuit's decision to

stay Gonzales's proceedings indefinitely. *Id.* at 1247-48.

The result is that more than 15 years after Gonzales's sentence became final in Arizona—and a full 22 years after the murder itself—this case is stayed, indefinitely, with no apparent prospect of reaching finality. Caught in this limbo are Darrel Wagner's widow and her son, victims themselves, who must continue to relive the horrible events of February 20, 1990. For them, as is often the case for crime victims, the Ninth Circuit's decision assures them of many more years with no end in sight to the continuing trauma.

SUMMARY OF THE ARGUMENT

By giving criminal defendants a new tactic to indefinitely delay punishment, the Ninth Circuit's decision threatens to harm the recognized interests of crime victims in attaining reasonable finality. It is well established that the State and the victim share a legitimate interest in seeing that the State's moral judgment is carried out. But while these interests are similar, the victim's interest is distinct and worthy of individual protection. The State's interest in finality arises from the need for proper enforcement of its laws, but the victim's interest in finality is profoundly personal and ultimately physical and psychological. For the victim, finality represents the resolution of a traumatic life event and its aftermath. Judicial policy

and social science recognize that victims often suffer added trauma as a result of so-called secondary victimization at the hands of the criminal-justice system. As a defendant inevitably seeks to employ all available means to delay punishment, the victim's trauma is prolonged. And while our system justly ensures that some delays are inevitable, the human cost of delay should be weighed when granting defendants new ways to postpone a sentence. Here, by creating a new right for a defendant to provide meaningful assistance to counsel *when the habeas challenge is purely record-based*, the Ninth Circuit's decision cannot justify the harm it will cause to crime victims' interest in reasonable finality.

This interest carries special weight here because Arizona's Constitution explicitly guarantees crime victims a prompt and final conclusion of a case after sentencing. In other words, the victim's rights and interests in this case, in addition to being worthy of judicial protection themselves, also heighten the need for the state to be able to enforce its laws in a timely manner. The Ninth Circuit's decision impairs not just a victim's need for reasonable finality, but also Arizona's legitimate state efforts to promote and protect this interest and the interests of its citizens generally.

ARGUMENT

I. The Ninth Circuit's decision harms the recognized rights of crime victims and their interests in attaining the real finality that comes from knowing the State's moral judgment will be carried out.

In *Payne v. Tennessee*, this Court recognized that evidence of a crime's impact on a particular victim is legitimate consideration when deciding the appropriate sentence for a crime. 501 U.S. 808, 819 (1991). This is because a jury deprived of victim-impact evidence may not be able to "know the full extent of the harm caused by the crime, including its impact on the victim's family and community." *Id.* at 830 (O'Connor, J., concurring). At root, *Payne* provides an affirmation of the simple, but nevertheless profound, recognition that each victim's uniqueness as a human being represents a unique loss to a family and a society. *See id.* at 824-25. If a sentencing decision fails to account for this loss, then it is possible that the penalty will not reflect the true "human cost of the crime." *Id.* at 826.

Although *Payne* recognizes the legitimacy of considering the victim's cost when a state imposes its sentence, this cost is no less worthy of consideration when the state seeks to implement its sentence, for the victim's interest does not end at sentencing. Victims of crime share a legitimate interest in seeing that the punishment is ultimately carried out. *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). *See also Jones v. Allen*, 485 F.3d 635, 641 (11th Cir. 2007)

("Not only the State, but also the [victim's] children . . . have a strong interest in seeing . . . punishment exacted"). Only after the sentence is executed can a victim achieve true finality, and "[f]inality is essential to both the retributive and the deterrent functions of criminal law." *Calderon*, 523 U.S. at 555.

This interest in finality may be shared by state and victim alike, but their interests are distinct and must be weighed separately. For the state, finality is rooted in a federal balance that respects the state's need to enforce its independent law-making power. This finality, then, is essentially an assurance that the state can execute its own moral judgment without violating paramount federal constitutional concerns. But for the victim, the need for finality is highly personal and affects the victim's physical and psychological wellbeing. *See* I.B. Finality for the victim means a resolution to a traumatic life event and its aftermath. "Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out." *Calderon*, 523 U.S. at 556.

Given this profound physical and psychological need for a conclusion, a victim has an interest in not only seeing the judgment enforced, but enforced in a reasonably prompt manner. As this Court has recognized, "Both the state and the victims of crime have an important interest in the *timely* enforcement of a sentence." *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (emphasis added). When lengthy federal proceedings indefinitely delay the implementation of a state's judgment, the victim necessarily experiences

a concomitant postponement of his or her ability to achieve reasonable finality. *See*, *e.g.*, *Calderon*, 523 U.S. at 556. As more and more time passes, the humane concerns at the heart of federal habeas review begin to fail to account for the reality that the accused is not the only stakeholder in the outcome of the appeal. So when courts empower the accused with a novel and unnecessary tactic for delaying execution of a sentence, those same tactics easily become means of visiting continued trauma on the victim or the victim's family. This trauma, and the victim's interest of being protected from it, must be accounted for when making decisions that could cause this harm to continue indefinitely.

II. The victim's trauma is not theoretical; social science and victim experience demonstrate that victims suffer secondary victimization as a State's final judgment is subject to never-ending challenge.

This Court's recognition of the victim's interest in finality is well supported by the actual victim experience. As studies show, the failure to achieve finality in a timely manner can lead to a secondary victimization inflicted by the criminal justice-system itself. The initial trauma caused by a crime is compounded as the victim's involvement with the crime is prolonged by continual delay in adjudication and punishment. This trauma can manifest itself in many forms. For example, the most consistently documented consequence of violent crime is posttraumatic

stress disorder (PTSD). Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims' Mental Health*, 23 J. Traum. Stress 182, 182 (2010); Dean G. Kilpatrick & Ron Acierno, *Mental Health Needs of Crime Victims: Epidemiology and Outcomes*, 16 J. Traum. Stress 119, 119 (2003). Though commonly associated with combat trauma, PTSD can occur any time a person suffers a psychologically traumatic event that is generally outside the range of usual human experience. Stedman's Medical Dictionary (27th ed. 2000). This disorder appears in both those directly victimized and those indirectly victimized, like a child or spouse, and the occurrence of PTSD is particularly high in family members and friends of homicide victims. Kilpatrick & Acierno, *Mental Health Needs of Crime Victims: Epidemiology and Outcomes*, 16 J. Traum. Stress 119, 125-27 (2003). Those suffering from PTSD experience intense fear, helplessness, and horror. *Id.* Studies also suggest a connection between initial victimization and later depression, substance abuse, panic disorder, agoraphobia, social phobia, obsessive-compulsive disorder, and even suicide. Parsons & Bergin, *The Impact of Criminal Justice Involvement on Victims' Mental Health*, 23 J. Traum. Stress at 182.

These intense and painful consequences of initial victimization are compounded by a prolonged and difficult experience with the criminal-justice system. *See id.* at 182-183; *see also* Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. Traum. Stress 159, 159 (2003).

This so-called secondary victimization sometimes causes even more harm than the initial criminal act. Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 Soc. Just. Res. 313, 321 (2002). Indeed, a victim's experience with the justice system often "means the difference between a healing experience and one that exacerbates the initial trauma." Parsons & Bergin, *The Impact of Criminal Justice Involvement on Victims' Mental Health*, 23 J. Traum. Stress at 182. For example, one study examining the effect of offender punishment on crime victim recovery found that most victims experienced improved recovery when there was an increased perceived punishment of the offender. Dr. Joel H. Hammer, *The Effect of Offender Punishment on Crime Victim's Recovery and Perceived Fairness (Equity) and Process Control*, University Microfilms International 87, Ann Arbor, MI (1989). Similarly, where offenders accepted plea bargains, the victims experienced greater recovery because of the absence of extended delays. *Id.*

These studies demonstrate that a timely resolution is important to victim recovery. Avoiding a prolonged proceeding may help avert the stressful impact of unreasonable delay. *Id.* In death-penalty cases, for example, Dan S. Levey, the President of the National Organization of Parents of Murdered Children, has observed that the automatic and often repeated appeals associated with the death penalty inflict continual trauma on victim family members.

Dan S. Levey, *Balancing the Scales of Justice*, 89 Judicature 289, 290 (2006). While defendants often seek tactical advantage through endless delays, victims must continually steel themselves to go to court and relive the murder year after year. *Id.* at 290-291.

The growing statutory and constitutional framework for considering the victim's interest is a sound one and rooted in actual victim experience. Secondary victimization exacts an enormous physical, psychological, financial, and emotional toll on victims. *Id.* at 291. This is itself an injustice and the total human cost of the crime cannot be accounted for without balancing the very real trauma caused by continual delay. *Id.* It is certainly true that some delay, and therefore additional trauma, may be inevitable as the courts give effect to an accused's constitutional rights. But every decision that could increase delay should be justified in light ofthe indisputable harm it will inevitably cause to victims.

Here, the Ninth Circuit's decision represents a needless infliction of additional trauma. As demonstrated by Petitioner, allowing a defendant to indefinitely delay habeas proceedings on the basis of inability to assist counsel will be a handy tool for a habeas petitioner who wishes to postpone implementation of his sentence. Most important, the Ninth Circuit's decision allows this even where the challenges are entirely record-based and could be resolved without any meaningful input from the defendant. In

other words, the substantial human cost of increased delay cannot be justified by the meager benefit, if any, the Ninth Circuit's decision would confer on a habeas petitioner.

III. The cost of delay should be given especially great weight in this case because Arizona's Constitution gives victims a fundamental right to a prompt and final conclusion after sentencing.

In addition to a victim's profound need to stanch ongoing physical and psychological trauma, the Ninth Circuit's decision would also have an injurious impact on Arizona crime victims' state constitutional rights. Arizona's Constitution enshrines a Victims' Bill of Rights (VBR), which went into effect on November 27, 1990—the year of the murder underlying this case—and enumerates specific individual rights intended to "preserve and protect victims' rights to justice and due process." Ariz. Const. art. II, § 2.1(A). *See also* Gessner H. Harrison, *The Good, The Bad, and The Ugly: Arizona's Courts and the Crime Victims' Bill of Rights*, 34 Ariz. St. L. J. 531, 532 (Summer 2002). In the case of murder, these rights are explicitly conferred on the deceased's spouse, parent, or child. *Id.* at § 2.1(C); *see also* ARS 13-4401(19) (defining "victim" to include, among others, a murder victim's "spouse, parent, child, grandparent or sibling").

Most important here, Arizona's VBR gives victims the "right to a speedy trial or disposition *and prompt and final conclusion of the case after the conviction and sentence*." Ariz. Const. art. II, § 2.1(A)(10) (emphasis added). These constitutional rights require Arizona's courts to consider not just the accused's right to a speedy trial, but also to account for the crime victim's rights to reasonable finality. *See State v. Dixon*, 226 Ariz. 545, 555, 250 P.3d 1174, 1184 (2011). Victim's rights may not be whittled away through judicially created ad hoc exceptions or contrary court rules, and the Arizona legislature is similarly prohibited from reducing rights conferred by Arizona's VBR. *See Knapp v. Martone*, 823 P.2d 685, 687 (1992); *see also State v. Lee*, 226 Ariz. 234, 237, 245 P.3d 919, 922 (App. 2011) ("[N]either the legislature nor court rules can eliminate or reduce rights guaranteed by the VBR"). In other words, Arizona's Constitution gives crime victims a fundamental right not to be victimized a second time as the defendant seeks to delay final punishment.

Of course, "the power of a state to pass laws means little if the State cannot enforce them." *Calderon*, 523 U.S. at 556 (internal quotes omitted). And the delay inherent in habeas proceedings poses a special threat to the State's interest in enforcing its judgments. *See id.* This is especially true here where the state's and the victim's distinct interests in reasonable finality themselves are intertwined in Arizona's VBR. By giving victims a constitutional right to a prompt and final conclusion, Arizona has

used its independent law-making authority to ensure that victims of crime achieve the finality necessary to find resolution. As Candy Lightner, the notable victim's advocate and mother who started Mothers Against Drunk Driving, stated in a speech in support of Arizona's Victim's Bill of Rights, "Victims don't want vengeance, they want healing, but there can be no healing until justice is done." Candy Lightner, Remarks at the Rally in Support of the Passage of Arizona's Victim's Bill of Rights (Sep. 1990). By giving the accused yet another tactic to delay punishment indefinitely, the Ninth Circuit's decision threatens to severely impair Arizona's constitutional guarantees of justice and reasonable finality.[2]

CONCLUSION

As demonstrated more fully by the Petitioner, the Ninth Circuit's decision to allow habeas petitioners an extra-statutory tactic to achieve indefinite delay of a capital sentence cannot withstand scrutiny, especially when the habeas petitioner's remaining challenges are entirely record-based and legal in nature.

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[2] Victims in other states face similar harm to their explicit guarantee of a prompt disposition to criminal proceedings. *See, e.g.*, Alaska Const. art. I, § 24; Cal. Const. art. I, § 28; Conn. Const. art. I, § 8(b); Idaho Const. art. I, § 22; Ill. Const. art. I, § 8.1; La. Const. art. 1, § 25; Mich. Const. art. I, § 24; Mo. Const. art. I, § 32; N.M. Const. art. 2, § 24; S.C. Const. art. I, § 24; Tenn. Const. art. 1, § 35; Wis. Const. art. I, § 9m.

This error is made only more manifest when weighed against the needs and rights of crime victims to see a State's moral judgment carried to its conclusion. AVCV asks the Court to give due consideration to victims' rights, especially those guaranteed by state constitutions, and to take into account the ongoing physical and psychological trauma that will inevitably result unless the Ninth Circuit's decision is reversed.

Respectfully submitted,

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May 31, 2012

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Nos. 11-218 & 10-930

IN THE

Supreme Court of the United States

CHARLES L. RYAN, Director,
Arizona Department of Corrections,

Petitioner,

v.

ERNEST VALENCIA GONZALES,

Respondent.

TERRY TIBBALS, Warden,

Petitioner,

v.

SEAN CARTER,

Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Sixth and Tenth Circuits

BRIEF OF RETIRED FEDERAL JUDGES AS *AMICI* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici curiae are a group of seven former federal circuit and district court judges who have substantial experience adjudicating habeas petitions and issues surrounding the competency of criminal defendants.[1] The attached Appendix contains a list of the *amici*, along with biographical information for each. *Amici* are interested in this case because of their years of dedicated service to the country and their commitment to its Constitution and laws.

Amici urge the Court to affirm the decisions below and to hold that a district court has the inherent authority to stay habeas proceedings if it determines that the inmate is incompetent and the inmate's assistance is essential to the presentation of the habeas claims.

SUMMARY OF ARGUMENT

All parties agree that a district court possesses the inherent authority to stay a federal habeas proceeding if it determines that the inmate is incompetent. Ryan Br. 20; Tibbals Br. 31; U.S. Br. 29-30; Gonzales Br. 1; Carter Br. 12. But Petitioners and the United States urge a narrow view of that authority. Arizona would limit district courts' authority to issue stays to habeas petitions raising a claim of actual innocence. Ryan Br. 20. Ohio, following the lead of the United States, advocates a broader approach but would still

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amici* and their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. All counsel of record for all parties have consented to the filing of this brief.

limit district courts' authority to issue stays to habeas proceedings where a fact-finding hearing is necessary. Tibbals Br. 31; U.S. Br. 29-30.

Those proposed limits on district courts' inherent authority are unjustified. The question of whether to stay *any* case – including a habeas proceeding – is a matter best left to the sound discretion of district courts. District courts already possess wide discretion in adjudicating claims of incompetence – and, where appropriate, issuing stays – in federal criminal trials and in habeas proceedings under *Ford v. Wainwright*. And they have exercised that discretion ably.

Here, therefore, the better rule is one that does not arbitrarily limit district courts' inherent authority to issue stays. Rather, the proper rule is the one adopted below: district courts should have the inherent authority to issue stays when a habeas petitioner's incompetence prevents communication with counsel and that communication is "essential" to the presentation of the petitioner's claims. *In re Gonzales*, 623 F.3d 1242, 1245 (9th Cir. 2010); *accord Carter v. Bradshaw*, 644 F.3d 329, 337 (6th Cir. 2011) (stay appropriate for all claims that "essentially require [the inmate's] assistance"). As Judge Posner put it, "[w]hatever the nature of the proceeding, the test [of whether to stay the proceeding on competency grounds] should be whether the defendant (petitioner, appellant, etc.) is competent to play whatever role in relation to his case is necessary to enable it to be adequately presented." *Holmes v. Buss*, 506 F.3d 576, 579 (7th Cir. 2007). That rule recognizes that there are a wide variety of scenarios in which a habeas petitioner's incompetence will stifle his counsel's ability to

adequately present his claims. And the rule properly places the question of whether to issue a stay in the sound discretion of the district court – discretion which, *amici* submit, district courts will continue to exercise wisely.

ARGUMENT

I. A District Court's Inherent Authority to Stay Habeas Proceedings Should Not Be Limited in the Manner Proposed by Petitioners and the United States.

District courts have the inherent authority to stay habeas proceedings "where such a stay would be a proper exercise of discretion." *Rhines v. Weber*, 544 U.S. 269, 276 (2005). "The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket . . . . How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936); *accord Clinton v. Jones*, 520 U.S. 681, 706-07 (1997) (recognizing a district court's "broad discretion to stay proceedings"). Incompetency has long been recognized as a valid reason for staying criminal proceedings. *See Rees v. Peyton*, 384 U.S. 312, 313-14 (1966); 4 William Blackstone, *Commentaries* 25 (1769); 1 Sir Matthew Hale, *The History of the Pleas of the Crown* 35 (Prof'l Books Ltd. 1971) (1736) (pre-1676 manuscript), quoted in *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 807 (9th Cir. 2003).

Petitioners and the United States, however, would severely curtail district courts' discretion to stay habeas proceeding on competency grounds. Their pro-

posed rules are unjust. Were one of those rules adopted, there would be many situations in which an incompetent inmate would be unable to secure habeas relief despite having a meritorious claim.

Arizona argues that district courts' discretion to stay habeas proceedings should be limited to habeas petitions that assert actual innocence. Ryan Br. 20-21. That proposed rule must be rejected because, as even the United States concedes, there are many habeas claims in addition to actual innocence for which a habeas petitioner's participation is "crucial."[2] U.S. Br. 29. Frequently, therefore, Arizona's rule will prevent inmates from successfully presenting meritorious habeas claims because the inmate is incompetent. Arizona's rule is thus incompatible with the central function of habeas in ensuring that criminal punishment is meted out in accord with the laws of the United States.

The clearest examples of meritorious habeas claims that could not be brought without a competent inmate's assistance arise from habeas petitions asserting ineffective assistance of counsel. That is because ineffective-assistance claims regularly require

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[2] Even Respondent Tibbals apparently would not limit stays to cases of actual innocence. Rather, like the United States, Ohio appears to take the view that in cases involving factfinding where "the prisoner's participation is essential to a dispositive evidentiary question," the court "might stay its proceedings 'to afford the prisoner the opportunity to regain his competence (either naturally or through medication).'" Tibbals Br. 31 (quoting U.S. Br. 16). As discussed below, this standard wrongly limits stays to only those habeas proceedings in which on-the-record fact-finding will occur.

the habeas court to conduct "additional factual development" beyond the cold trial record:

> The evidence introduced at trial . . . [is] devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis. If the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it. The appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse. . . . The trial record may contain no evidence of alleged errors of omission, much less the reasons underlying them.

Massaro v. United States, 538 U.S. 500, 505 (2003). Thus, an inmate's input can be crucial in presenting ineffective-assistance claims; it is often necessary for an inmate to assist counsel in uncovering and establishing the "additional factual development," *id.*, necessary to litigate the claim. Consider these examples:

- In *Hollis v. United States*, 687 F.2d 257 (8th Cir. 1982), habeas relief was granted on the ground that trial counsel had been ineffective in failing to appeal a conviction. Critical to the court's decision to grant the writ was the inmate's testimony that he "informed his attorney of his wish to appeal his sentence" and the attorney ignored it. *Id.* at 259. Had the inmate been incompetent and unable to testify, the court may have denied habeas relief on

the ground that the inmate had intentionally waived his right to appeal.

- In *United States v. Harris*, 408 F.3d 186 (5th Cir. 2005), habeas relief was granted on the ground that trial counsel had been ineffective in refusing to allow the inmate to testify at trial. The trial transcript revealed that the inmate's counsel had asked him in open court whether he wished to testify and the inmate had said no. But in granting habeas relief, the court credited the testimony of the inmate at a habeas hearing that the inmate had "told his lawyer that he wanted to testify, but was told, '[n]o, there is no need. We've got this case won.'" *Id.* at 192 (brackets in original). Had the inmate been incompetent and incapable of testifying in the habeas hearing, the court would have been presented only with trial transcript showing that the inmate had declined to testify. The court never would have learned that the inmate's statement on the record came only after counsel had impermissibly refused his request to testify.

- In *United States v. Grant*, 446 F. App'x 473 (3d Cir. 2011), habeas relief was granted on the ground that trial counsel had been ineffective in failing to advise the inmate that he would be sentenced as a career offender if he pleaded guilty. One way that the inmate established that the ineffective assistance caused him prejudice was by testifying that he would have gone to trial had he known that he would be sentenced as a career offender. Plainly, that testimony would not have been available if the inmate had been incompe-

tent. Nor could an incompetent inmate have informed the court of what trial counsel had advised.

Although they provide many of the clearest examples, ineffective-assistance claims are not the only types of habeas claims for which an inmate's participation is crucial. There are many other circumstances in which a meritorious habeas claim can be brought only when the inmate is sufficiently lucid to assist his counsel. Indeed, as the United States recognizes (U.S. Br. 29), even after the passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, there are circumstances under which a state prisoner is entitled to an evidentiary hearing. *See Cullen v. Pinholster*, 131 S. Ct. 1388, 1400-01 (2011). And federal prisoners are routinely entitled to evidentiary hearings in proceedings brought under 28 U.S.C. § 2255. *See, e.g.*, *Massaro*, 538 U.S. at 505; *see also* U.S. Br. 29. An inmate's participation may be a critical to preparing for and conducting such an evidentiary hearing.

For instance, an inmate's testimony at a habeas hearing has often been the key to the successful presentation of a habeas claim. *See, e.g.*, *Pearce v. Cox*, 354 F.2d 884, 902 (10th Cir. 1965) (an inmate's testimony demonstrated that his guilty plea was not voluntarily entered). In *Tibbals*, for example, were the inmate competent, he could provide his own account of his "experiences, thoughts, and capacities of perception" at the time of his trial – bolstering his claim that he was incompetent to be tried. Carter Br. 32.

Even where an inmate does not testify himself, he still may assist his counsel in identifying witnesses

and other evidence for a habeas hearing. Consider, for example, habeas claims asserting a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). *Brady* claims often require habeas counsel to present detailed evidence outside the trial record, and an inmate may provide insight into how to present that evidence. The inmate himself may identify the witnesses or other evidence necessary to establish a *Brady* violation. *Cf. Cooper v. Woodford*, 358 F.3d 1117, 1119 (9th Cir. 2004) ("prima facie case of a *Brady* violation" established by declarations made by fellow inmate and prison warden); *Graves v. Cockrell*, 351 F.3d 143 (5th Cir. 2003) (successive habeas petition asserting *Brady* violation allowed to proceed where the prosecutor disclosed the existence of exculpatory evidence in a "media interview"). Or the inmate may corroborate or provide context to improperly withheld evidence, assisting his attorneys in showing that the *Brady* violation was material. *Cf. Monroe v. Angelone*, 323 F.3d 286, 298-317 (4th Cir. 2003) (habeas relief granted for *Brady* violation after court undertook detailed analysis of ten pieces of previously undisclosed exculpatory evidence). In either case, a meritorious *Brady* claim involving additional fact-finding may go unrecognized where an incompetent inmate is unable to assist his counsel. The rule urged by Arizona therefore should be rejected.

So too should Ohio's proposed rule be rejected. Ohio, following the views expressed by the United States, contends that a district court has no equitable discretion to grant a stay in a habeas proceeding that will not involve "an evidentiary hearing." Tibbals Br. 31; U.S. Br. 29-30. That view, while not as constricted as Arizona's, is still flawed. A habeas peti-

tioner may have critical information to offer his counsel even where his habeas proceedings will not encompass further on-the-record fact-finding. The facts of *Ryan* provide a useful example. Respondent Gonzales was *pro se* for part of his criminal trial, and ultimately had eleven different lawyers over the course of his trial and sentencing. In that situation, Gonzales is by far the best-situated person to provide his habeas counsel with a complete account of what occurred at the trial, including his allegations of judicial bias. *Cf. Holmes*, 506 F.3d at 580 ("The petitioner was at his trial; his current lawyers were not. He may—if mentally competent—be able to convey to his lawyers a better sense of the alleged misbehavior of the prosecutor and of defense counsel than the trial transcript and other documentation provide."). To be sure, the precise facts of Gonzales's case may not often be replicated, but they are illustrative of the variety of unpredictable scenarios district courts may be presented with. There is no reason to strip district courts of the discretion to enter stays in such situations where they are warranted.

II. District Courts Will Ably Exercise Their Inherent Authority to Issue Stays.

The rules advocated by Petitioners and the United States appear motivated by a concern that district courts lack the ability and knowledge to adjudicate stay motions. Petitioners fear that district courts will accede to the "dilatory tactics" of inmates feigning incompetency, *see* Ryan Br. 19; Tibbals Br. 28, and the United States worries that district courts will issue "indefinite stays" that needlessly prolong collateral review, *see* U.S. Br. 30.

But as *amici* know from first-hand experience, the concerns of Petitioners and the United States are unfounded. In reality, district courts will exercise their discretion to issue stays prudently. District courts are unlikely to be fooled by feigned incompetency; courts will deny frivolous incompetency claims at the earliest possible point; and courts will revisit indefinite stay orders to ensure that they are still needed.

This Court can be assured that district courts will exercise their inherent authority competently because district courts already possess considerable experience with incompetency claims. District courts routinely adjudicate claims of incompetency brought by federal criminal defendants facing trial and by former federal prisoners serving a term of supervised release. *See* 18 U.S.C. § 4241(a). And district courts regularly determine whether capital inmates (in both state and federal penitentiaries) meet the minimum standards of competency required for executions. *See Ford v. Wainwright*, 477 U.S. 399 (1986). District courts have amassed considerable practical experience in deciding incompetency claims in those settings, and courts use that experience to manage claims of incompetency in the habeas context.

A. District Courts Have Little Difficulty Detecting Feigned Incompetency.

Petitioners argue that were the decisions below upheld, "capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the death sentence." Ryan Br. 19 (quotation marks omitted); *see also* Tibbals Br. 28. But for such "dilatory tactics" to succeed, habeas petitioners would have to feign incompetency. As *amici*

can attest, district courts are unlikely to be fooled by false incompetency claims.

Criminal defendants have feigned incompetency for hundreds of years, and for just as long, courts have successfully identified these charlatans. *See Cooper v. Oklahoma*, 517 U.S. 348, 365-66 (1996) (citing sources). As Sir John Hawles, Solicitor-General to King William III, remarked, "there is a great difference between pretences and realities, and *sana* and *non sana memoria* hath been often tryed in capital matters, and the prisoners have reaped so little benefit by their pretences, it being always discovered, that we rarely hear of it." John Hawles, *Remarks on the Trial of Mr. Charles Bateman* (1685), 11 How. St. Tr. 474, 478 (1816), *quoted in Cooper*, 517 U.S. at 365. So too today – neither Petitioners nor the United States have cited a single case in which a criminal defendant successfully fooled medical professionals and the court into concluding (incorrectly) that he was incompetent.

That is because district courts cut through feigned incompetency by carefully scrutinizing the evidence submitted in support of the claim. District courts also order psychological evaluations in which experts evaluate the inmate. *See* 18 U.S.C. § 4241(b). As this Court has recognized, "it is unusual for even the most artful malingerer to feign incompetence successfully for a period of time while under professional care." *Cooper*, 517 U.S. at 365. Thus, just as district courts are rarely fooled by criminal defendants falsely claiming incompetency to avoid trial – or capital inmates falsely claiming incompetency in *Ford* hearings to forestall their executions – courts are unlikely to be

fooled by inmates feigning incompetency to drag out habeas proceedings.

B. District Courts Will Deny Meritless Stay Motions at the Earliest Possible Stage.

Another reason that "dilatory tactics," Ryan Br. 19, are unlikely to succeed is that district courts are practiced in denying stay motions at the earliest possible point in the proceedings. A motion to stay proceedings on incompetency grounds presents several opportunities for district courts to weed out frivolous claims early.

First, when an inmate moves for a stay, a district court need not even order a medical evaluation where it finds that there is no basis for doing so. *See, e.g.*, *United States v. Smith*, 348 F. App'x 636, 637 (2d Cir. 2009); *United States v. Williams*, 998 F.2d 258, 262-63 (5th Cir. 1993).

Second, even when a district court orders a medical examination, the court need not hold an evidentiary hearing. Rather, district courts may, in their discretion, make competency determinations solely on the basis of a psychiatric report. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007); *United States v. Thompson*, 528 F.3d 110, 121-22 (2d Cir. 2008). In practice, evidentiary hearings on competency issues are regularly denied where the psychiatric report shows little sign of severe mental deficiencies.

Third, in those cases where the evidence of incompetency is sufficient to warrant an evidentiary hearing, district courts will issue stays only in those cases where they are truly warranted. District courts will likely require the inmate's attorneys to demonstrate

his incompetence by a preponderance of the evidence. *Cf.* 18 U.S.C. § 4241(d); *Cooper*, 517 U.S. at 362. And as scholars have recognized, only a small minority of incompetence claims succeed in practice. *See* Virginia Aldige Hiday & Padraic J. Burns, *Mental Illness and the Criminal Justice System, in A Handbook For the Study of Mental Health* 478, 490 (Teresa L. Scheid & Tony N. Brown eds., 2d ed. 2010).[3]

Thus, as *amici* know by experience, the notion that frivolous incompetency claims will inevitably delay habeas proceedings, *see* Ryan Br. 19; Tibbals Br. 28, is simply wrong. District courts are able to weed out frivolous incompetency claims without undue expense or delay, denying the weakest claims without a medical examination or on the basis of a written psychiatric report. When incompetency claims have sufficient support to warrant an evidentiary hearing, district courts weigh the evidence carefully and grant a stay only when necessary. Petitioners' fears of "dilatory tactics," Ryan Br. 19, are therefore illusory.

C. District Courts Will Revisit Stay Orders When Appropriate.

The United States argues that district courts should be denied the authority to issue "indefinite stays." U.S. Br. 30; *see also* Tibbals Br. 27-32. But that position is contradictory. The United States recognizes that stays are sometimes warranted to prevent the injustice of adjudicating habeas claims while

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[3] *Available at* http://hmid.basijmed.ir/public/hmid/books/mental%20health/A_Handbook_for_the_Study_of_Mental_Health__Social_Contexts__Theories__and_Systems___2nd_edition.pdf.

the petitioner is incompetent. U.S. Br. 29-30. If time passes and the inmate remains incompetent, the injustice does not wane. Arbitrarily ending an existing stay is just as unjust as refusing to grant a stay in the first place. Thus, district courts' inherent authority to stay habeas proceedings should not be constrained by arbitrary limits on a stay's duration. As *amici* know, district courts do not issue stays lightly, and courts revisit stay orders as appropriate.

When a district court makes a finding of incompetence, the common practice is to issue a stay of moderate duration – typically "not to exceed four months," 18 U.S.C. § 4241(d)(1) – in order to "determine whether there is a substantial probability that in the foreseeable future [the incompetent inmate] will attain the capacity to permit the proceedings to go forward," *id.* Thus, district courts do not rush to issue "indefinite stays"; they first take care to determine whether a limited stay is appropriate to restore the inmate to competency.

In addition, district courts may order that an inmate be medicated with antipsychotic drugs in an effort to restore the inmate to competency. *See Sell v. United States*, 539 U.S. 166, 169 (2003). Thus, "indefinite stays" are necessary only when an inmate's mental infirmities are so profound that he is beyond the reach of modern medicine – and only a very limited number of cases fall into that category.

Last, even if an inmate is so incompetent that a district court must issue a stay that does not recite a definite end point, there is every reason to believe that district courts will revisit the stay order periodically, inquiring about the status of the inmate and

testing whether the stay is still necessary. That is precisely the approach that this Court took in *Rees v. Peyton*, 386 U.S. 989 (1967). This Court exercised its inherent authority to stay Rees's habeas proceedings "until further order of the Court" – that is, indefinitely. *Id.* at 989; *see also Anderson v. Kentucky*, 376 U.S. 940 (1964) (staying a direct appeal on competency grounds "indefinitely"). This Court then periodically inquired into Rees's status. *See Rees v. Superintendant of Va. St. Penitentiary*, 516 U.S. 802 (1995). In the rare case in which that kind of stay is required, courts will not neglect their duty to ensure that the stay is as limited as possible under the circumstances. *See, e.g., Carter*, 644 F.3d at 337.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to affirm the decisions below.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECO
ANL
BRIEF

Supreme Court, U.S.
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In The
Supreme Court of the United States

CHARLES L. RYAN, Director,
Arizona Department of Corrections,

Petitioner,

vs.

ERNEST VALENCIA GONZALES,

Respondent.

TERRY TIBBALS, Warden,

Petitioner,

vs.

SEAN CARTER,

Respondent.

On Writs Of Certiorari To The United States Courts Of Appeals For The Sixth And Ninth Circuits

BRIEF OF UTAH, ALABAMA, ARKANSAS, COLORADO, DELAWARE, GEORGIA, NEVADA, NEW MEXICO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, WASHINGTON, WYOMING, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

The States have compelling sovereign interests in the finality of their criminal judgments, their power to punish offenders, and their good faith efforts to enforce constitutional rights. *See, e.g., Harrington v. Richter*, 131 S. Ct. 770, 787 (2011). The decisions below improperly undermine those interests. They allow a death-sentenced petitioner to postpone, perhaps forever, the final disposition of a federal court's review of a State's death sentence.

SUMMARY OF ARGUMENT

The Ninth and Sixth Circuits permit an indefinite, perhaps permanent, federal stay of execution of a state death sentence even though no court has found the sentence to be unconstitutional. Both created this remedy based on a perceived statutory right to be competent to proceed in federal habeas review. As Arizona and Ohio have shown, neither statute relied on supports the right the circuits created. This amicus brief supplements their textual analysis by showing how the judicially concocted right to competence and a stay undermines legitimate state efforts to enforce their criminal judgments.

While federal habeas review provides a legitimate "'guard against extreme malfunctions in the state criminal justice systems,'" it also "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some

admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Id.* at 786-87 (citations omitted). The atextual right to be competent to proceed in federal habeas review – first created by the Ninth Circuit nearly a decade ago – compounds those problems by generating lengthy competency litigation in death penalty habeas cases even when a stay is ultimately denied. And competency litigation has expanded beyond just the Ninth Circuit to courts across the nation.

Neither the Constitution nor any Act of Congress creates a right to competence to assist habeas counsel. This Court should therefore hold that such a right does not exist – and put an end to the indefinite stays and protracted litigation in federal habeas cases that has resulted from the decisions of the Ninth and Sixth Circuits.

ARGUMENT

Through 18 U.S.C. § 3599(a)(2), Congress provided funded counsel to state death row inmates to prosecute their federal habeas challenges to their capital convictions and death sentences. The Ninth Circuit has read into that provision an additional right: the right to be competent to assist their federally funded habeas counsel. The Ninth Circuit did not purport to find the additional right in the text of § 3599(a)(2). Rather, it based the right on a purported

"common law tradition" that "inform[s] [its] interpretation of the statutes Congress has enacted." *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 812-13 (9th Cir.), *cert. denied*, *Woodford v. Rohan*, 540 U.S. 1069 (2003). Applying this court-created rule, the Ninth Circuit ordered the federal district court to stay Gonzales's death sentence. *Gonzales*, Pet. App. A8-9. The Ninth Circuit's atextual right and the remedy created for it allows an inmate to use § 3599(2) as a means to halt the habeas action he has initiated rather than as a means to prosecute it.

The Sixth Circuit recently created the same right. It did so by importing the statute governing competency proceedings in federal criminal prosecutions into federal habeas challenges to state convictions. *Carter,* Pet. App. 4a-9a. The Sixth Circuit adopted the same remedy the Ninth Circuit imposes: an indefinite stay. *Id.* at 13a-15a.

As Arizona and Ohio explain in their merits briefs, the Ninth and Sixth Circuits improperly rewrote or applied federal statutes to create a right to be competent to proceed in habeas review. The amici States offer this brief to explain the practical detriments to their legitimate interests that these improperly created rights perpetuate.

Competency-Based Stays And Competency Litigation In Federal Habeas Cases Unjustifiably Infringe On The States' Legitimate Interests In The Finality Of Their Presumptively Valid Judgments

The judicially-created rules in these two cases allow a habeas petitioner in a capital case to obtain relief – a delay, perhaps forever, in executing their sentence – even though the petitioner has failed to prove that his conviction or sentence resulted from an "'extreme malfunction[ ] in the state criminal justice systems.'" *Richter*, 131 S. Ct. at 787 (citations omitted). Such an indefinite, and potentially permanent, stay unreasonably interferes with the States' interests in punishing their worst offenders.

Unlike any other habeas petitioner, a death-sentenced petitioner has every incentive to find ways to postpone a federal court's decision on whether his sentence resulted from an "extreme malfunction" in state processes. If he loses, his sentence will be carried out sooner. Even if he wins, he may be retried and resentenced to death. An indefinite stay, on the other hand, will postpone the merits inquiry, and with it, the execution of his death sentence.

This Court has recognized that "[i]n particular, capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death." *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005). The Court has also recognized that staying federal habeas cases too frequently

undermines the Anti-Terrorism and Effective Death-Penalty Act's purpose to reduce delays in federal habeas litigation. *Id.* at 276-77. Above all, the Court has recognized that a habeas petition "should not be stayed indefinitely." *Id.* at 277. Yet, the rule adopted by the Ninth and Sixth Circuits potentially permits a petitioner to do just that.[1]

And even if the death-sentenced petitioner cannot convince the court that he is incompetent to proceed and win an indefinite stay, he has every reason to pursue the issue. Competency litigation provides another avenue for delay. Challenging his competency costs the petitioner nothing regardless of how frivolous the challenge may be. If he succeeds, he may avoid execution until his competence to assist habeas counsel is restored. If his competence is never determined to be restored, he may avoid execution forever without ever proving that his sentence was unconstitutional (or that he is incompetent to be executed under the standard of *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986)). Even if he does not succeed in procuring a stay, the additional delay generated by litigating his competence will "prolong [his] incarceration and avoid execution of [his death] sentence" at

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[1] The Seventh Circuit has also adopted staying a habeas petition as the remedy when a petitioner is incompetent to proceed. But it did not actually recognize that a right to be competent to proceed exists. Rather, it assumed the right existed because the respondent did not argue otherwise. *Holmes v. Levenhagen*, 600 F.3d 756 (7th Cir. 2010); *Holmes v. Buss*, 506 F.3d 576, 578-79 (7th Cir. 2007).

least for the period of that litigation. *See Rhines*, 544 U.S. at 277-78. This is precisely the kind of interference in state criminal justice processes that federal stays should avoid. *Id.*

Post-*Rohan* competency litigation in the Ninth Circuit has been widespread.[2] It has also been widespread in circuits where no right to be competent has been recognized. Those circuits have avoided deciding whether the right exists at all by finding – after often lengthy delays – that the petitioner was in fact competent. *See Ferguson v. Sec. Dep't of Corrections*, 580 F.3d 1183, 1222 (11th Cir. 2009), *cert. denied, Ferguson v. McNeil*, 130 S. Ct. 330 (2010); *Clayton v. Roper*, 515 F.3d 784, 790 n.2 (8th Cir.), *cert. denied*, 555 U.S. 1003 (2008); *Holmes v. Buss*, 506 F.3d at 578-79, *appeal after remand*, *Holmes v. Levenhagen*,

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[2] *See, e.g.*, *White v. Ryan*, No. 08-cv-08139-GMS, 2012 WL 273707 (Jan. 31, 2012); *Mulder v. Baker*, No. 3:09-CV-00610-PMP-WGC (Sept. 26, 2011); *Gonzales*, Pet. App. A; *Nash v. Ryan*, 581 F.3d 1048 (9th Cir. 2009); *Blair v. Cullen*, No. CV 99-6859, 2010 WL 5563896 (C.D. Cal. Mar. 21, 2010), *report and recommendation adopted by Blair v. Cullen*, 2011 WL 91949 (C.D. Cal. Jan. 04, 2011); *Lewis v. Ayers*, No. CIV S-02-0013, 2010 WL 364504 (E.D. Cal. Jan. 26, 2010), *report and recommendation adopted by Lewis v. Ayers*, 2010 WL 3502667 (E.D. Cal. Sept. 2, 2010); *Rogers v. McDaniel*, No. 3:02-cv-0342, 2008 WL 820088 at *3 (D. Nev. Mar. 24, 2008); *Hill v. Ayers*, No. 4-94-cv-641, 2008 WL 683422 (N.D. Cal. Mar. 10, 2008). In one case, a death-sentenced petitioner relied on the *Rohan* right to be competent to ask to reopen his federal habeas action under Fed. R. Civ. P. 60(b). *Van Adams v. Schriro*, No. CV-04-1359, 2009 WL 89465 (D. Ariz. Jan. 14, 2009).

600 F.3d 756; *Mines v. Dretke*, No. 03-11137, 2004 WL 2913069 (5th Cir. Dec. 16, 2004).[3]

Competency litigation has often proven to be lengthy. In Florida, for example, a death-sentenced inmate named Ferguson relied on *Rohan* to challenge his competence to proceed. *Ferguson v. Dep't of Corrections*, No. 1:95-cv-00573 at doc. no. 58. It took twenty months to resolve whether Ferguson was competent, which, in turn, postponed disposing of the second amended petition for approximately the same period. *Id.* at doc. nos. 57, 58, 107, 108.

In *Clayton v. Luebbers*, the litigation to determine whether Clayton was in fact competent lasted over two years. *Clayton v. Luebbers*, No. 4:02-cv-08001, doc. nos. 79 and 104. It included a seven month sojourn at the United States Medical Center for Federal Prisoners. *Clayton*, 515 F.3d at 789. The evaluator took ten months from the order for an evaluation to issue her report. *Clayton*, No. 4:02-cv-08001, doc. nos. 79 and 104. Clayton took another five months to renew his motion for a stay based on his alleged incompetence to proceed with his habeas petition. *Id.* at doc. nos. 93 and 104.

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[3] The Northern District of Oklahoma, however, ruled that no right to be competent to proceed in federal habeas exists. It rejected the Ninth Circuit's reading of § 3599 to create such a right because the statute's plain language does not support it. *Cole v. Workman*, No. 08-CV-0328-CVE-PJC, 2011 WL 3862143 at *15-17 (N.D. Okla. 2011).

In *Dansby v. Norris*, No. 02-cv-04141, 2009 WL 485418 (W.D. Ark. Feb. 26, 2009), the district court, citing *Clayton*, "assume[d] that competency is required, without answering whether an inmate must be competent to proceed in a habeas action." *Id.* at *2. That was over three years ago. The competency issue remains unresolved. *Dansby v. Norris*, No. 4:02-cv-04141, doc. nos. 140 and 167.

In Utah, death row inmate Ronald Lafferty asked the federal district court to stay his habeas action, alleging that he is incompetent to proceed. *Lafferty v. Turley*, No. 2:07-cv-00322, doc. no. 89. The district court has stayed the case and held the legal question of Lafferty's right to be competent in abeyance pending a determination of his actual competence. *Id.* at doc. no. 104, 164.[4] That issue remains unresolved. Consequently, Lafferty's federal habeas case has not materially advanced to a final resolution for two and one-half years.[5] *See, e.g., Carter*, Pet. App. 27a-28a (nearly three years of litigation from the date of the motion for competency determination until the final order on Carter's competency); *Holmes v. Davis*, 00-cv-04177-SEB-DML, doc. nos. 3 and 115 (over four

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[4] The order for no. 164 is under seal and does not appear on the PACER docket.

[5] The district court did require Lafferty to file a reply in support of whatever habeas claims his counsel determined did not require his input. *Id.* at doc. no. 164. Otherwise, nothing has been done on the merits since the district court stayed the case in November 2009 pending the competency determination.

years of litigation from remand in *Buss*, 506 F.3d 576, until final order on competency determination).

And a determination of incompetence will not always end a death-sentenced petitioner's resistance to his habeas case moving forward. They may also oppose the States' efforts to restore them to competence so that the case may proceed, as Gonzales attempted to do. He argued that, not only should district court stay his federal habeas case because he was incompetent to proceed, but also that he could never be restored to competence by forcible medication. According to him, his case did not meet this Court's criteria for forcible medication to restore competence in *Sell v. United States,* 539 U.S. 166 (2003). *Gonzales*, Pet. App. B5-7. If successful, such a maneuver would both impede the States' right to carry out their lawful sentences and prohibit the States from removing the impediment.

As these examples show, litigation related to whether a death-sentenced petitioner is competent to proceed in the habeas case he initiated can be lengthy. And as shown, a death-sentenced petitioner has every incentive to delay – permanently, if possible – the resolution of his case.

But any time a federal court delays its review of a state judgment, it necessarily infringes on a state's interest in carrying out that judgment. Where the delay does not further the legitimate federal interest in correcting "extreme malfunctions" in state judicial systems that result in constitutional violations, it is

an unreasonable incursion into the States' compelling interests. *See In re Blodgett*, 502 U.S. 236, 239 (1992). As Arizona and Ohio have shown, a habeas petitioner can provide little, if any, assistance to their federal habeas counsel. *See also Cole*, 2011 WL 3862143 at *16-17 (recognizing that Cole's assistance was of little use because the federal court's review was limited to the record developed in state court and other sources of information existed for anything beyond that record).

Competency stays and competency litigation delays are particularly unacceptable because they arise from a series of Ninth Circuit decisions that improperly read a right to competency in habeas proceedings into a federal statute that provides nothing of the sort. And the Sixth Circuit has followed suit by misapplying a statute that governs competency procedures in federal criminal prosecutions to federal habeas review of a state judgment. The law does not and should not permit a death-sentenced petitioner to first initiate then halt, perhaps forever, the determination of whether his presumptively valid sentence is unconstitutional. This Court should therefore confirm that the atextual right to be competent to proceed in federal habeas does not in fact exist.

CONCLUSION

For the reasons argued, the Court should reverse the Ninth and Sixth Circuits' decisions.

Respectfully submitted,

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